

**To: Honorable Anthony J. Scirica, Chair, Standing
 Committee on Rules of Practice and Procedure**

**From: David F. Levi, Chair, Advisory Committee on the
 Federal Rules of Civil Procedure**

Date: May 14, 2001, as revised July 31, 2001

Re: Report of the Civil Rules Advisory Committee

Introduction

The Civil Rules Advisory Committee met on March 12, 2001, and April 23 and 24, 2001, at the Administrative Office of the United States Courts in Washington, D.C. It voted to recommend adoption of a new rule and rules amendments that were published for comment in August 2000 and January 2001, with modifications in response to the public comments. Part I of this report details these recommendations in four parts.

Part II describes Advisory Committee recommendations to publish for comment three sets of rules amendments. Each involves a project that has been long on the Advisory Committee agenda. The first set, which would amend Civil Rule 23, grows out of ten years of Advisory Committee work, important empirical studies, and the Report of the Ad Hoc Mass Torts Working Group. The central focus is on improving review of class-action settlements and providing for the first time in Rule 23 for appointment of class counsel and approval of fee awards. Additional changes address notice and also

the times for acting to determine whether to certify a class and to consider revision of a certification decision.

The second proposed amendment would rewrite Civil Rule 51 to express clearly the many jury-instruction rules that have grown out of its moderately opaque text. New provisions are added to address such matters as the time for requesting instructions and the court's obligation to inform the parties of all proposed instructions.

The third proposed amendment would rewrite Civil Rule 53 to reflect the vast changes that have overtaken the use of special masters. This work was assisted by a study undertaken by the Federal Judicial Center. The amendment is not intended either to encourage or to discourage the pretrial and post-judgment uses of special masters that have grown up since Rule 53 was framed to address the use of trial masters. It is intended to give guidelines for these new practices. Special attention is devoted to the relationship between the appointment of special masters and a judicial institution — magistrate judges — that did not exist when Rule 53 was written. In addition, the draft reduces the many cumbersome details that have been written into present Rule 53.

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II Action Items: Rules Recommended For Publication

Introduction

The class action rule has been the subject of close study by the Civil Rules Advisory Committee over the past ten years. Rule 23(b)(3), providing for damage class actions, is of comparatively

recent vintage. It is safe to say that the eminent authors of that provision had little conception in 1966 that a mere rule of joinder, designed to "achieve economies of time, effort, and expense, and promote uniformity of decision as to persons similarly situated,"¹ would become such a prominent feature in the landscape of modern litigation, dramatically altering the stakes and scale of class action litigation. However, while the drafters of 23(b)(3) may not have anticipated its extraordinary impact, they certainly did understand that the Rule would require re-evaluation after a period of experience. We have undertaken that evaluation, in the light of experience, empirical study, and academic and professional commentary.

The present set of rules attempt to address the problems in class action litigation that are redressable by rule. These proposals focus on the persistent problem areas in the conduct of class suits, including oversight, the appointment and compensation of class counsel, and the disruptions caused by duplicative and competing class litigation.² The overall goal of the Committee has been to develop rule amendments that, on the one hand, protect against improvident certifications and that, on the other, protect the interests of class members once a class action is filed. The rule amendments seek to provide the court with the tools, authority, and discretion to closely supervise class action litigation.

¹ Notes of the Advisory Committee on 1966 Amendments.

² The proposals that address overlapping and competing class actions are being held back from the formal publication and comment process to afford an opportunity to gather additional information about the nature and extent of the problems that may persist in face of continually evolving practice.

1. Background and Synopsis

In 1991, at the behest of the Judicial Conference, the Civil Rules Committee began a study of class action litigation that culminated in a variety of proposed rule amendments published in 1996. Those proposals focused on the substantive standards for certification of class actions. Advocates for reform advised the Committee that in many cases the certification decision was dispositive of the litigation; once a class is certified and the stakes of the litigation are magnified, whatever the merits of the claim, the defendant may conclude there is little choice but to bow to the overwhelming pressure to settle. To address this problem and foster the growth of appellate law, the Committee proposed Rule 23(f), the interlocutory appeal provision that went into effect in 1998. The Committee also devoted attention to: (1) whether the rule should permit or require a court to make some preliminary assessment of the merits and public value of a proposed class litigation as part of the certification decision and (2) whether the rule should permit certification of settlement classes on a less exacting standard than litigation classes. The public comment on these proposals was extensive, forceful, and enlightening. The comments are collected in the four-volume set of working papers of the Committee that were published in May 1997. Ultimately, the Committee reached the view that the questions surrounding certification standards were not ripe for rule making. The Committee reasoned that the interlocutory appeal provision and the recent decisions in *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997), and *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999), would lead to the development of a body of case law that would guide district judges and the Committee and that it would be premature to curtail this natural development. Instead, the Committee turned its attention away from the substantive standards for certification to

matters of process and procedure, in particular to the adequacy of the rule in assuring appropriate judicial oversight of class action litigation from stem to stern, from certification, to class counsel appointment, to settlement approval, and finally to attorney fee awards.

To advance this study, a class action subcommittee, chaired by Judge Lee H. Rosenthal, was appointed. Professor Edward Cooper, Reporter to the Committee, supported the work of the subcommittee, as did Professor Richard L. Marcus, who was retained as Special Reporter to assist the subcommittee in drafting attorney appointment and compensation rules. The subcommittee had before it an unusually rich record concerning the operation of Rule 23(b)(3), including the voluminous record generated in the public comments on the 1996 proposed revisions to Rule 23; the Federal Judicial Center's 1996 empirical study of federal class action suits; the RAND Institute for Civil Justice's publication in 2000 of *Class Action Dilemmas: Pursuing Public Goals for Private Gain*, analyzing the results of detailed case studies and surveys of lawyers engaged in class action litigation in state and federal courts; and the extensive materials assembled by the Working Group on Mass Torts. In addition to these sources, the subcommittee obtained practical insight by consulting with a number of experienced class action practitioners who represent all points of view. While the proposals offered for publication undoubtedly will be controversial, all of them have at least some support from leading members of the class action bar. Taken as a whole, the package is a balanced and neutral attempt to protect individual class members and further the overall goals of the class action device — efficiency, uniform treatment of like cases, and access to court for claims that cannot be litigated individually,

"without sacrificing procedural fairness or bringing about other undesirable results."³

The proposals focus on four areas: the timing of the certification decision and notice; judicial oversight of settlements; attorney appointment; and attorney compensation.

2. Rule 23 Proposals

a. Proposed Rule 23(c)

i. Rule 23(c)(1)(A): The Timing of Certification

The 1996 proposals included one to amend Rule 23(c)(1) by changing the requirement that a certification decision be made "as soon as practicable" into a "when practicable" requirement. Although public comment was largely favorable, the Standing Committee declined to approve the amendment on two grounds. One was that it would be better to consider all Rule 23 changes in a single package, leaving apart as clearly separate the Rule 23(f) appeal provision that was adopted. The other was doubt as to the wisdom of the change. It was feared that the change in wording would encourage courts to delay deciding certification motions and would lead to an increase in precertification discovery into the merits of a class suit. Amended Rule 23(c)(1)(A) recommends a new variation on the "when practicable" language, calling for a certification determination "at an early practicable time." The Notes address the concerns previously identified. The proposal is presented as part of a package of

³ Notes of the Advisory Committee on 1966 Amendments.

amendments addressed to the overall process of managing class actions, not as a "piecemeal" item. The proposed language is consistent with the reality that courts generally make certification decisions after the deliberation required for a sound decision, as shown by Federal Judicial Center figures on the time from filing to decision of certification motions. The proposed language is also consistent with best practice; a court should decide a certification motion promptly, but only after obtaining the information necessary to make that decision on an informed basis. The proposed Committee Note clearly states that the amended language is not intended to permit undue delay or permit extensive discovery unrelated to certification. Finally, this change dovetails with proposed new Rule 23(g) on appointment of class counsel; the appointment process may benefit from allowing sufficient time for competing applicants to appear before the certification decision is made.

The proposed amendment at first reading may seem overly fastidious, a matter of semantics. In fact, it authorizes the more flexible approach many courts take to class action litigation, recognizing the important consequences to the parties of the court's decision on certification. The current rule's emphasis on dispatch in making the certification decision has, in some circumstances, led courts to believe that they are overly constrained in the period before certification. A certain amount of discovery may be appropriate during this period to illuminate issues bearing on certification, including the nature of the issues; whether the evidence on the merits is common to the members of the proposed class; whether the issues are susceptible to class-wide proof; whether there are conflicts problems within classes; and what trial management problems the case will present. As the Note discusses, this discovery does not concern the weight of the merits or the strength of the evidence.

Furthermore, if the defendant makes a motion to dismiss or for summary judgment as to the named plaintiffs, the court may choose to deal with these motions in advance of deciding the certification issue. The proposed Note sets out factors that a court should consider in deciding whether the certification decision is ready for resolution, or is appropriately deferred for specific reasons. By making it clear that the timing of a certification decision, and related discovery, is limited to that necessary to determine certification issues, the amended Rule and Note give to courts and lawyers guidance lacking in the present rule.

(ii). Rule 23(c)(1)(B): The Order Certifying a Class

Proposed Rule 23(c)(1)(B) is new. It specifies the contents of an order certifying a class action. Such a requirement facilitates the application of Rule 23(f), by requiring that a court must define the class it is certifying and identify the class claims, issues, and defenses. The proposed amendment also requires that the order certifying a (b)(3) class, not the notice alone, state when and how class members can elect exclusion.

(iii). Rule 23(c)(1)(C): The Conditional Nature of Class Certification

The proposed amended language in Rule 23(c)(1)(C) allows amendment of an order granting or denying class certification at any time up to "final judgment"; the current rule terminates the power at "the decision on the merits," an event that may happen before final judgment. This change avoids possible ambiguity in the reference to "the decision on the merits." Following a determination of liability,

for example, proceedings to define the remedy may demonstrate the need to amend the class definition or subdivide the class.

(iv). Rule 23(c)(2): Notice

Proposed new Rule 23(c) requires what the cases now treat as aspirational: class action notices are to be in "plain, easily understood language." This requirement is supported by the model forms of class action notice that will be available to judges and lawyers as a result of an ongoing Federal Judicial Center project to develop such notices. Examples of illustrative forms for securities and products liability cases can be found at <http://www.fjc.gov> by clicking on the "Class Action Notices" item. Rule 23(c) for the first time expressly requires notice in (b)(1) and (b)(2) class actions. Notice in these mandatory classes is not made the same as the (b)(3) requirement of individual notice, because there is no right to request exclusion from (b)(1) and (b)(2) classes. Notice to such classes is intended to serve more limited, but important, interests, such as the interest in monitoring the conduct of the action.

b. Rule 23(e): Settlement Review

The need for improved judicial review of proposed class settlements, and the abuses that can result without effective judicial review, was a recurring theme in the testimony and written statements submitted to the Committee during the public comment on the 1996 rule proposals. The 1996 proposals included a "settlement class" provision that the Committee deferred pending lower court development of the *Amchem* and *Ortiz v. Fibreboard Corporation* rulings. The proposed amendment instead focuses on strengthening

the rule provisions governing the process of reviewing and approving proposed class settlements.

New Rule 23(e)(1)(A) makes clear what many courts have required, but what lawyers and other courts often fail to appreciate: a court must approve the pre-certification settlement, voluntary dismissal, or withdrawal of class claims. Although the amendment requires court approval of a settlement, voluntary dismissal, or withdrawal of class claims, even before certification is sought or achieved, the detailed notice, hearing, and review provisions of Rule 23(e) apply only if a class has been certified.

New Rule 23(e)(1)(B) requires notice of a proposed settlement, but only when class members would be bound by the settlement. The notice is to issue in a "reasonable" manner; individual notice is not required in all classes or all settlements. New Rule 23(e)(1)(C) adopts an explicit standard for approving a settlement for a class: the proposed settlement must be "fair, reasonable, and adequate," and the district court must make detailed findings to support the conclusion that the settlement meets this standard. The Note sets out factors that experience and case law have identified as the most reliable indicators of whether a settlement meets the required criteria.

New Rule 23(e)(2) supports a court's examination of the terms of the proposed settlement by making explicit that a court may direct the parties to file a copy or summary of any "agreement or understanding" made in connection with the proposed settlement. Such "side agreements" are often important to understanding the terms the parties have agreed to, but often are not disclosed to the court.

New Rule 23(e)(3) permits a court, in a case involving a class previously certified under Rule 23(b)(3), to allow a class member to request exclusion from the class after notice of the terms of a proposed settlement. This proposal attempts to put members of (b)(3) classes that are certified for litigation, and then settle at a later date, in as informed a position as members of classes certified for settlement whose opportunity to opt out arises when the terms of the settlement are known. The permission to opt out after a tentative settlement is reached generally has not been fatal to class action settlements; many class actions are presented for certification with a proposed settlement so that the certification decision, evaluation of the settlement, and right to opt out merge in time. Settlement class actions are viewed with particular caution by the courts because of the lack of adversariness and because plaintiffs' counsel lack the leverage of a possible trial. See e.g. *Hanlon v. Chrysler*, 150 F.3d 1011, 1026 (9th Cir. 1998) (joining with other circuits in holding that "settlement approval that takes place prior to formal class certification requires a higher standard of fairness" because of the dangers of collusion). However, pre-certification settlements do have one feature that is worthy of extension to all (b)(3) class actions: the right to opt out of a settlement when the terms of that settlement are known. This proposal introduces a measure of class member self-determination and control that best harmonizes the class action with traditional litigation. It also provides the assurance to the supervising court that if the settlement is unfair in any significant way class members can be expected to protect themselves by opting out. Many – and often most – members of Rule 23(b)(3) opt-out classes

"consent" to join the class by inattention and inertia⁴; such inadvertent litigants should not be locked into a settlement that they consider to be unfair.⁵ In short, the provision of an opt-out opportunity, once the terms of the settlement are known, is just the sort of "structural assurance of fairness," see *Amchem*, that permits class actions in the first place.

The proposal will only make a difference in cases in which the class is certified and the initial opt-out period expires before a settlement agreement is reached. In such a case, the proposal would allow members of a (b)(3) class, who did not request exclusion when the certification notice first issued, to have a second opportunity to opt out, once the settlement terms are known. A court may decide that the circumstances make providing a second opportunity to

⁴ Benjamin Kaplan, *The Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 Harv. L. Rev. 356, 397 (1967) (noting that the opt out default includes persons in the class who whether from ignorance, timidity, or unfamiliarity with business or legal matters "will simply not take the affirmative step" of joining a litigation).

⁵ Professor John C. Coffee, Jr. of the Columbia University Law School suggests that a "bill of rights" for class members should include the right to opt out from any settlement; "the basic principle should be that each member of the class is entitled to reject the settlement and bring his or her own individual action. This right should not expire until the terms of the settlement are known." Testimony of Professor John C. Coffee, Jr., Adolf A. Berle Professor of Law, before the Subcommittee on Administrative Oversight and the Courts of the Committee on the Judiciary, United States Senate, October 30, 1997, at 9.

request exclusion inadvisable. The case may have been litigated to a stage that makes it similar to a fully tried suit and that reduces the need for a second opportunity to opt out. There may be other circumstances that make the additional opt-out opportunity inadvisable.

The Committee asks for comment on two alternative versions of the settlement opt-out opportunity. The first alternative requires the second opportunity to request exclusion from the class unless the court for good cause finds otherwise. The second alternative is more neutral, neither presuming that there will or will not be a settlement opt-out opportunity: the notice of settlement "may state terms that afford class members a second opportunity to elect exclusion from the class."

c. Rule 23(g): Class Counsel Appointment

All recent examinations of class action practice recognize the crucial significance of class counsel. But Rule 23 nowhere addresses the selection or responsibilities of class counsel.

Paragraph (1)(A) recognizes the requirement that class counsel be appointed for each class that the court certifies. As the Note points out, the court may appoint lead or liaison counsel during the precertification period as a case management measure.

Paragraph (1)(B) states that class counsel "must fairly and adequately represent the interests of the class." The Note discusses the distinctive role of class counsel, making it clear that the relationship between class counsel and the individual members of the class is not the same as the one between a lawyer and an individual

client. Appointment as class counsel entails special, paramount responsibilities to the class as a whole.

Paragraph (2) sets out the appointment procedure for class counsel. The rule recognizes that competition for appointment as class counsel may be beneficial in some cases. Paragraph 2(A) states that the court may allow a "reasonable period" after a class action is filed for attorneys seeking appointment as class counsel to apply. This provision dovetails with the change to Rule 23(c)(1)(A) that directs a certification determination at an early practicable time. In addition, paragraph 2(C) specifically authorizes the court to direct counsel to propose terms for awarding fees and costs in the order appointing class counsel. The provision encourages counsel and the court to reach early shared understandings about the basis on which fees will be sought. Such a provision has been encouraged by judges emphasizing the importance of judicial control over attorney fee awards. This feature might foster competitive applications; permit innovative approaches such as bidding, where appropriate; obviate later objections to the fee request; and serve as a more productive way for the court to deal in advance with fee award matters that seem to defy regulation after the fact. The court's authority to include provisions regarding fees in its order appointing class counsel provides a bridge to the proposed attorney fees rule.

d. Rule 23(h): Attorney Fees

Attorney fees play a prominent role in class action practice and are the focus of much of the concern about class actions. The disparity between the large size of the attorney fee award and the small or meretricious "coupon" recoveries by class members in some consumer class actions brings the civil justice system into disrepute.

The RAND Report's most specific recommendations are that judges must assume much greater responsibility for determining attorney fees, rather than simply accepting previously negotiated arrangements, and must determine fees in relation to the actual benefits that class members collect as a result of the lawsuit. The only provisions on fee awards in the Civil Rules appear in Rule 54(d)(2), but that rule is not tailored to the special features of class actions. The amendment addresses notification to the class of a motion for award of fees, the rights of objectors, and the criteria to be considered in determining the amount of the fee award.

The proposed rule applies when an award of attorney fees is authorized by law or the parties' agreement in a class action. The award must be "reasonable," and it is the court's job to determine the reasonable amount. The rule does not attempt to influence the ongoing case law development regarding a choice between (or combination of) the percentage and lodestar amounts. As emphasized in the Note, because the class action is a creation of the court, the court has a special responsibility to superintend the attorney fee award, as it also does with regard to proposed settlements. The Note further recognizes the critical role of the court in assuring that the class action achieved actual results for class members that warrant a substantial fee award.

Paragraph (1) characterizes the attorney fee motion as one "under Rule 54(d)(2), subject to the provisions of this subdivision." The entry-of-judgment and appeal-time features covered by Rule 58 (which refers explicitly to Rule 54(d)(2)) would apply to class action fee motions as well. However, the distinctive features of class actions call for application of the provisions of subdivision (h) rather than the different provisions of Rule 54(d)(2). Subdivision (h) therefore

provides that a motion for fees must be made "at a time directed by the court."

The rule also requires notice to class members in a reasonable manner (similar to Rule 23(e) notice to the class of a proposed settlement) regarding attorney fee motions by class counsel. In settled cases, sufficient notice should ordinarily be included in the notice sent out under Rule 23(e), on which the notice requirement is modeled.

Paragraph (2) allows any class member or party from whom payment is sought to object to the motion. The Note points out that the court may direct discovery and links the decision whether to allow it to the completeness of the fee motion, pointing out that broad discovery is not normal in regard to fee motions.

Paragraph (3) calls for findings under Rule 52(a) and authorizes the court to determine whether to hold a hearing on the motion. In settled class actions, the hearing might well be held in conjunction with proceedings under Rule 23(e), and in other situations there should be considerable flexibility in determining what suffices as a hearing. The findings requirement appears in Rule 54(d)(2) and provides important support for meaningful appellate review, as the Note points out. As under Rule 54(d)(2), the court can refer the motion to a special master or magistrate judge.

The Note sets out the factors that courts have recently, and consistently, found important to consider in determining whether the fee sought is "reasonable." The Note attempts to identify the analytic framework for such determinations, recognizing that the case law will continue to develop and will have subtle variations from circuit to

circuit. The factors discussed in the Note cut across different methods of determining the size of fee awards, such as percentage of fund or lodestar.

3. Conclusion

The proposed amendments, and Note language, are attached.

Nothing has become simpler or less controversial since the Standing Committee last approved the publication of proposed amendments to Rule 23. The Advisory Committee requests publication of these proposals and looks forward to what will surely be a lively and informative period of public comment.

**PROPOSED AMENDMENTS TO THE FEDERAL
RULES OF CIVIL PROCEDURE***

Rule 23. Class Actions

* * * * *

(c) ~~Determining~~ation by Order Whether to Certify a
Class Action to Be Maintained; Notice and Membership
in Class; ~~Judgment; Actions Conducted Partially as Class~~
~~Actions~~ Multiple Classes and Subclasses.

(1) (A) ~~As soon as practicable after the~~
~~commencement of an action brought as a class~~
~~action, the court shall determine by order whether~~
~~it is to be so maintained. An order under this~~
~~subdivision may be conditional, and may be~~
~~altered or amended before the decision on the~~
~~merits.~~ When a person sues or is sued as a
representative

*New material is underlined; matter to be omitted is lined through.

13 of a class, the court must — at an early practicable
14 time — determine by order whether to certify the
15 action as a class action.

16 (B) An order certifying a class action must define
17 the class and the class claims, issues, or defenses.

18 When a class is certified under Rule 23(b)(3), the
19 order must state when and how members may elect
20 to be excluded from the class.

21 (C) An order under Rule 23(c)(1) ~~may be~~ is
22 conditional, and may be altered or amended before
23 ~~the decision on the merits~~ final judgment.

24 (2) (A) (i) When ordering certification of a class
25 action under Rule 23, the court must direct
26 appropriate notice to the class. The notice
27 must concisely and clearly describe in plain,
28 easily understood language:

- 29 ● the nature of the action,
- 30 ● the claims, issues, or defenses with
- 31 respect to which the class has been
- 32 certified,
- 33 ● the right of a class member to enter
- 34 an appearance through counsel if the
- 35 member so desires,
- 36 ● the right to elect to be excluded from
- 37 a class certified under Rule 23 (b)(3),
- 38 and
- 39 ● the binding effect of a class judgment
- 40 on class members under Rule 23(c)(3).
- 41 (ii) For any class certified under Rule 23
- 42 (b)(1) or (2), the court must direct
- 43 notice by means calculated to reach a
- 44 reasonable number of class members.

45 (iii) ~~In~~ For any class action maintained
46 certified under ~~subdivision~~ Rule
47 23(b)(3), the court ~~shall~~ must direct to
48 class ~~the members of the class~~ the best
49 notice practicable under the
50 circumstances, including individual
51 notice to all members who can be
52 identified through reasonable effort.
53 ~~The notice shall advise each member~~
54 ~~that (A) the court will exclude the~~
55 ~~member from the class if the member so~~
56 ~~requests by a specified date; (B) the~~
57 ~~judgment, whether favorable or not, will~~
58 ~~include all members who do not request~~
59 ~~exclusion; and (C) any member who~~
60 ~~does not request exclusion may, if the~~

61 ~~member desires, enter an appearance~~

62 ~~through counsel.~~

63 * * * * *

Committee Note

Subdivision (c). Subdivision (c) is amended in several respects. The requirement that the court determine whether to certify a class "as soon as practicable after commencement of an action" is replaced by requiring determination "at an early practicable time." The notice provisions are substantially revised. Notice now is explicitly required in (b)(1) and (b)(2) classes.

Paragraph (1). Subdivision (c)(1)(A) is changed to require that the determination whether to certify a class be made "at an early practicable time." The Federal Judicial Center study showed many cases in which it was doubtful whether determination of the class-action question was made as soon as practicable after commencement of the action. This result occurred even in districts with local rules requiring determination within a specified period. These seemingly tardy certification decisions often are in fact made as soon as practicable, for practicability itself is a pragmatic concept, permitting consideration of all the factors that may support deferral of the certification decision. If the "as soon as practicable" phrase is applied to require determination at an early practicable time, it does no harm. But the "as soon as practicable" exaction may divert attention from the many practical reasons that may justify deferring the initial certification decision. The period immediately following filing may support free exploration of settlement opportunities, although

settlement discussions should not become the occasion for deferring the activities needed to prepare for the certification determination. The party opposing the class may prefer to win dismissal or summary judgment as to the individual plaintiffs without certification and without binding the class that might have been certified. Time may be needed to explore designation of class counsel under Rule 23(g).

Time also may be needed for discovery to support the certification decision. Although an evaluation of the probable outcome on the merits is not properly part of the certification decision, discovery in aid of the certification decision often includes information required to identify the nature of the issues that actually will be presented at trial. In this sense it is appropriate to conduct controlled discovery into the "merits" of the dispute. A court must understand the nature of the disputes that will be presented on the merits in order to evaluate the presence of common issues; to know whether the claims or defenses of the class representatives are typical of class claims or defenses; to measure the ability of class representatives adequately to represent the class; to assess potential conflicts of interest within a proposed class; and particularly to determine for purposes of a (b)(3) class whether common questions predominate and whether a class action is superior to other methods of adjudication. The most critical need is to determine how the case will be tried. Some courts now require a party requesting class certification to present a "trial plan" that describes the issues that likely will be presented at trial, a desirable — and at times indispensable — practice that often requires better knowledge of the facts and available evidence than can be gleaned from the pleadings and argument alone. Wise management of the discovery needed to support the certification decision recognizes that it may be most efficient to frame the discovery so as to reduce wasteful duplication

if the class is certified or if the litigation continues despite a refusal to certify a class. See the Manual For Complex Litigation Third, § 21.213, p. 44; § 30.11, p. 214; § 30.12, p. 215.

Quite different reasons for deferring the decision whether to certify a class appear if related litigation is approaching maturity. Actual developments in other cases may provide invaluable information bearing on the desirability of class proceedings and on class definition. If the related litigation involves an overlapping or competing class, indeed, there may be compelling reasons to defer to it.

Although many circumstances may justify deferring the certification decision, active management may be necessary to ensure that the certification decision is not delayed beyond the needs that justify delay. These amendments are not intended to encourage or excuse a dilatory approach to the certification determination. Class litigation must not become the occasion for long-delayed justice. Class members often need prompt relief, and orderly relationships between the class action and possible individual or other parallel actions require speedy proceedings in the class action. The party opposing a proposed class also is entitled to a prompt determination of the scope of the litigation, see *Philip Morris v. National Asbestos Workers Medical Fund*, 214 F.3d 132 (2d Cir. 2000). The object of Rule 23(c)(1)(A) is to ensure that the parties act with reasonable dispatch to gather and present information required to support a well-informed determination whether to certify a class, and that the court make the determination promptly after sufficient information is submitted.

Subdivision (c)(1)(B) requires that the order certifying a (b)(3) class, not the notice alone, state when and how class members can opt out. It does not address the questions that may arise under Rule 23(e) when the notice of certification is combined with a notice of settlement.

Subdivision (c)(1)(C), which permits alteration or amendment of an order granting or denying class certification, is amended to set the cut-off point at final judgment rather than "the decision on the merits." This change avoids any possible ambiguity in referring to "the decision on the merits." Following a determination of liability, for example, proceedings to define the remedy may demonstrate the need to amend the class definition or subdivide the class. The determination of liability might seem a decision on the merits, but it is not a final judgment that should prevent further consideration of the class certification and definition. In this setting the final judgment concept is pragmatic. It is not the same as the concept used for appeal purposes, but it should be flexible in the same way as the concept used in defining appealability, particularly in protracted institutional reform litigation. Proceedings to enforce a complex decree may generate several occasions for final judgment appeals, and likewise may demonstrate the need to adjust the class definition.

The authority to amend an order under Rule 23(c)(1) before final judgment does not restore the practice of "one-way intervention" that was rejected by the 1966 revision of Rule 23. A court may not decide the merits first and then certify a class. It is no more appropriate to certify a class after a determination that seems favorable to the class than it would be to certify a class for the purpose of binding class members by an adverse judgment previously rendered without the protections that flow from class certification. A determination of

liability after certification, however, may show the need to amend the class definition. In extreme circumstances, decertification may be warranted after further proceedings show that the class is not adequately represented or that it is not proper to maintain a class definition that substantially resembles the definition maintained up to the time of ruling on the merits.

Paragraph (2). The first change made in Rule 23(c)(2) is to require notice in Rule 23(b)(1) and (b)(2) class actions. The present rule expressly requires notice only in actions certified under Rule 23(b)(3). Members of classes certified under Rules 23(b)(1) or (b)(2) cannot request exclusion, but have interests that should be protected by notice. These interests often can be protected without requiring the exacting efforts to effect individual notice to identifiable class members that stem from the right to elect exclusion from a (b)(3) class.

The direction that class-certification notice be couched in plain, easily understood language is added as a reminder of the need to work unrelentingly at the difficult task of communicating with class members. It is virtually impossible to provide information about most class actions that is both accurate and easily understood by class members who are not themselves lawyers. Factual uncertainty, legal complexity, and the complication of class-action procedure itself raise the barriers high. In some cases these barriers may be reduced by providing an introductory summary that briefly expresses the most salient points, leaving full expression to the body of the notice. The Federal Judicial Center has undertaken to create illustrative clear-notice forms that provide a helpful starting point. Even with these illustrative guides, the responsibility to "fill in the blanks" with clear language for any particular case remains challenging. The challenge

will be increased in cases involving classes that justify notice not only in English but also in another language because significant numbers of members are more likely to understand notice in a different language.

Extension of the notice requirement to Rule 23(b)(1) and (b)(2) classes justifies applying to those classes, as well as to (b)(3) classes, the right to enter an appearance through counsel. Members of (b)(1) and (b)(2) classes may in fact have greater need of this right since they lack the protective alternative of electing exclusion.

Subdivision (c)(2)(A)(ii) requires notice calculated to reach a reasonable number of members of a Rule 23(b)(1) or (b)(2) class. The means of notice designed to reach a reasonable number of class members, should be determined by the circumstances of each case. See *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 319 (1950): "[N]otice reasonably certain to reach most of those interested in objecting is likely to safeguard the interests of all * * *." Notice affords an opportunity to protect class interests. Although notice is sent after certification, class members continue to have an interest in the prerequisites and standards for certification, the class definition, and the adequacy of representation. Notice supports the opportunity to challenge the certification on such grounds. Notice also supports the opportunity to monitor the continuing performance of class representatives and class counsel to ensure that the predictions of adequate representation made at the time of certification are fulfilled. These goals justify notice to all identifiable class members when circumstances support individual notice without substantial burden. If a party addresses regular communications to class members for other purposes, for example, it may be easy to include the class notice with a routine distribution. But when

individual notice would be burdensome, the reasons for giving notice often can be satisfied without attempting personal notice to each class member even when many individual class members can be identified. Published notice, perhaps supplemented by direct notice to a significant number of class members, will often suffice. In determining the means and extent of notice, the court should attempt to ensure that notice costs do not defeat a class action worthy of certification. The burden imposed by notice costs may be particularly troublesome in actions that seek only declaratory or injunctive relief.

If a Rule 23(b)(3) class is certified in conjunction with a (b)(2) class, the (c)(2)(A)(iii) notice requirements must be satisfied as to the (b)(3) class.

RULE 23(e): REVIEW OF SETTLEMENT**Rule 23. Class Actions**

* * * * *

(e) Settlement, Voluntary Dismissal, or Compromise, and

Withdrawal. ~~A class action shall not be dismissed or~~

~~compromised without the approval of the court, and notice of~~

~~the proposed dismissal or compromise shall be given to all~~

~~members of the class in such manner as the court directs.~~

(1) (A) A person who sues or is sued as a

representative of a class may settle, voluntarily

dismiss, compromise, or withdraw all or part of the

class claims, issues, or defenses, but only with the

court's approval.

(B) The court must direct notice in a reasonable

manner to all class members who would be bound

14 by a proposed settlement, voluntary dismissal, or
15 compromise.

16 (C) The court may approve a settlement, voluntary
17 dismissal, or compromise that would bind class
18 members only after a hearing and on finding that
19 the settlement, voluntary dismissal, or compromise
20 is fair, reasonable, and adequate.

21 (2) The court may direct the parties seeking approval of
22 a settlement, voluntary dismissal, compromise, or
23 withdrawal under Rule 23(e)(1) to file a copy or a
24 summary of any agreement or understanding made in
25 connection with the proposed settlement, voluntary
26 dismissal, or compromise.

27 (3) [Alternative 1] In an action previously certified as
28 a class action under Rule 23(b)(3), the Rule 23(e)(1)(B)
29 notice must state terms on which individual class

30 members may elect exclusion from the class, but the
31 court may for good cause refuse to allow an opportunity
32 to elect exclusion if class members had an earlier
33 opportunity to elect exclusion.

34 **(3) [Alternative 2]** In an action previously certified as
35 a class action under Rule 23(b)(3), the Rule 23(e)(1)(B)
36 notice may state terms that afford individual class
37 members a second opportunity to elect exclusion from
38 the class.

39 **(4) (A)** Any class member may object to a proposed
40 settlement, voluntary dismissal, or compromise
41 that requires court approval under Rule
42 23(e)(1)(C).

43 **(B)** An objector may withdraw objections made
44 under Rule 23(e)(4)(A) only with the court's
45 approval.

Committee Note

Subdivision (e). Subdivision (e) is amended to strengthen the process of reviewing proposed class-action settlements. It applies to all classes, whether certified only for settlement; certified as an adjudicative class and then settled; or presented to the court as a settlement class but found to meet the requirements for certification for trial as well.

Paragraph (1). Subdivision (e)(1)(A) expressly recognizes the power of a class representative to settle class claims, issues, or defenses. The reference to settlement is added as a term more congenial to the modern eye than "compromise." The requirement of court approval is made explicit for pre-certification dispositions. The new language introduces a distinction between voluntary dismissal and a court-ordered dismissal that has been recognized in the cases. Court approval is an intrinsic element of an involuntary dismissal. Involuntary dismissal often results from summary judgment or a motion to dismiss for failure to state a claim upon which relief can be granted. It may result from other circumstances, such as discovery sanctions. The distinction is useful as well in determining the need for notice as addressed by paragraph 1(B).

The court-approval requirement is made explicit for voluntary pre-certification dismissals to protect members of the described class and also to protect the integrity of class-action procedure. Because class members may rely on the class action to protect their interests, the court may direct notice of the dismissal to alert class members that they can no longer rely on the class action to toll statutes of

limitations or otherwise protect their interests. As an alternative, the court may provide an opportunity for other class representatives to appear similar to the opportunity that often is provided when the claims of individual class representatives become moot. Special difficulties may arise if a settlement appears to include a premium paid not only as compensation for settling individual representatives' claims but also to avoid the threat of class litigation. A pre-certification settlement does not bind class members, and the court cannot effectively require an unwilling representative to carry on with class representation. Nor is it fair to stiffen the defendant's resolve by forbidding payment of a premium to avoid further subjection to the burdens of class litigation. One effective remedy again may be to seek out other class representatives, leaving it to the parties to determine whether to complete a settlement that does not conclude the class proceedings.

Subdivision (e)(1)(B) carries forward the notice requirement of present Rule 23(e), but makes it mandatory only for settlement, voluntary dismissal, or compromise of the class claims, issues, or defenses. Notice is required both when the class was certified before the proposed settlement and when the decisions on certification and settlement proceed simultaneously — the test is whether the settlement is to bind the class, not only the individual class representatives, by the claim- and issue-preclusion effects of *res judicata*. The court may order notice to the class of a disposition made before a certification decision, and may wish to do so if there is reason to suppose that other class members may have relied on the pending action to defer their own litigation. Notice also may be ordered if there is an involuntary dismissal after certification; one likely reason would be concern that the class representative may not have provided adequate representation.

Subdivision (e)(1)(C) confirms and mandates the already common practice of holding hearings as part of the process of approving settlement, voluntary dismissal, or compromise that would bind members of a class. The factors to be considered in determining whether to approve a settlement are complex, and should not be presented simply by stipulation of the parties. A hearing should be held to explore a proposed settlement even if the proponents seek to waive the hearing and no objectors have appeared. But if there are no factual disputes that require consideration of oral testimony, the hearing requirement can be satisfied by written submissions.

Subdivision (e)(1)(C) also states the standard for approving a proposed settlement that would bind class members. The settlement must be fair, reasonable, and adequate. The court, further, must make findings that support the conclusion that the settlement meets this standard. The findings must be set out in detail to explain to class members and the appellate court the factors that bear on applying the standard: "The district court must show that it has explored these factors comprehensively to survive appellate review." *In re Mego Financial Corp. Securities Litigation*, 213 F.3d 454, 458 (9th Cir. 2000).

The seemingly simple standard for approving a settlement may be easily applied in some cases. A settlement that accords all or nearly all of the requested relief, for example, is likely to fall short only if there is good reason to fear that the request was significantly inadequate.

Reviewing a proposed class-action settlement often will not be easy. Many settlements can be evaluated only after considering a host of factors that reflect the substance of the terms agreed upon, the

knowledge base available to the parties and to the court to appraise the strength of the class's position, and the structure and nature of the negotiation process. A helpful review of many factors that may deserve consideration is provided by *In re: Prudential Ins. Co. America Sales Practice Litigation Agent Actions*, 148 F.3d 283, 316-324 (3d Cir. 1998). Any list of these factors must be incomplete. The examples provided here are only examples of factors that may be important in some cases but irrelevant in others. Matters excluded from the examples may, in a particular case, be more important than any matter offered as an example.

Application of these factors will be influenced by variables that are not listed. One dimension involves the nature of the substantive class claims, issues, or defenses. Another involves the nature of the class, whether mandatory or opt-out. Another involves the mix of individual claims — a class involving only small claims may be the only opportunity for relief, and also pose less risk that the settlement terms will cause sacrifice of recoveries that are important to individual class members; a class involving a mix of large and small individual claims may involve conflicting interests; a class involving many claims that are individually important, as for example a mass-torts personal-injury class, may require special care. Still other dimensions of difference will emerge.

Among the factors that may bear on review of a settlement are these:

- (A) a comparison of the proposed settlement with the probable outcome of a trial on the merits of liability and damages as to the claims, issues, or defenses of the class and individual class members;

- (B) the probable time, duration, and cost of trial;
- (C) the probability that the class claims, issues, or defenses could be maintained through trial on a class basis;
- (D) the maturity of the underlying substantive issues, as measured by the information and experience gained through adjudicating individual actions, the development of scientific knowledge, and other facts that bear on the ability to assess the probable outcome of a trial on the merits of liability and individual damages as to the claims, issues, or defenses of the class and individual class members;
- (E) the extent of participation in the settlement negotiations by class members or class representatives, a judge, a magistrate judge, or a special master;
- (F) the number and force of objections by class members;
- (G) the probable resources and ability of the parties to pay, collect, or enforce the settlement compared with enforcement of the probable judgment predicted under (A);
- (H) the existence and probable outcome of claims by other classes and subclasses;
- (I) the comparison between the results achieved for individual class or subclass members by the settlement or compromise and the results achieved — or likely to be achieved — for other claimants;

(J) whether class or subclass members, or the class adversary, are accorded the right to opt out of the settlement;

(K) the reasonableness of any provisions for attorney fees, including agreements with respect to the division of fees among attorneys and the terms of any agreements affecting the fees to be charged for representing individual claimants or objectors;

(L) whether the procedure for processing individual claims under the settlement is fair and reasonable;

(M) whether another court has rejected a substantially similar settlement for a similar class; and

(N) the apparent intrinsic fairness of the settlement terms.

Apart from these factors, settlement review also may provide an occasion to review the cogency of the initial class definition. The terms of the settlement themselves, or objections, may reveal an effort to homogenize conflicting interests of class members and with that demonstrate the need to redefine the class or to designate subclasses. Redefinition of the class or the recognition of subclasses is likely to require renewed settlement negotiations, but that prospect should not deter recognition of the need for adequate representation of conflicting interests. This lesson is entrenched by the decisions in *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999), and *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997).

Paragraph (2). Subdivision (e)(2) authorizes the court to direct that settlement proponents file copies or summaries of any agreement or understanding made in connection with the settlement. This

provision does not change the basic requirement that all terms of the settlement or compromise must be filed. It aims instead at related undertakings. Class settlements at times have been accompanied by separate agreements or understandings that involve such matters as resolution of claims outside the class settlement, positions to be taken on later fee applications, division of fees among counsel, the freedom to bring related actions in the future, discovery cooperation, or still other matters. The reference to "agreements or understandings made in connection with" the proposed settlement is necessarily open-ended. An agreement or understanding need not be an explicit part of the settlement negotiations to be connected to the settlement agreement. Explicit agreements or unspoken understandings may be reached outside the settlement negotiations. Particularly in substantive areas that have generated frequent class actions, or in litigation involving counsel that have tried other class actions, there may be accepted conventions that tie agreements reached after the settlement agreement to the settlement. The functional concern is that the seemingly separate agreement may have influenced the terms of the settlement by trading away possible advantages for the class in return for advantages for others. This functional concern should guide counsel for the settling parties in disclosing to the court the existence of agreements that the court may wish to inquire into. The same concern will guide the court in determining what agreements should be revealed and whether to require filing complete copies or only summaries. Filing will enable the court to review the agreements as part of the settlement review process. In some circumstances it may be desirable to include a brief summary of a particularly salient separate agreement in the notice sent to class members.

The direction to file copies or summaries of agreements or understandings made in connection with a proposed settlement should consider the need for some measure of confidentiality. Some agreements may involve work-product or related interests that may deserve protection against general disclosure. One example frequently urged relates to some forms of opt-out agreements. A defendant who agrees to a settlement in circumstances that permit class members to opt out of the class may condition its agreement on a limit on the number or value of opt-outs. It is common practice to reveal the existence of the agreement to the court, but not to make public the threshold of class-member opt-outs that will entitle the defendant to back out of the agreement. This practice arises from the fear that knowledge of the full back-out terms may encourage third parties to solicit class members to opt out.

Paragraph (3). Subdivision (e)(3) creates an opportunity to elect exclusion from a class certified under Rule 23(b)(3) after settlement terms are announced. Often there is an opportunity to opt out at this point because the class is certified and settlement is reached in circumstances that lead to simultaneous notice of certification and notice of settlement. In these cases, the basic Rule 23(b)(3) opportunity to elect exclusion applies without further complication. Paragraph (3) creates a second opportunity for cases in which there has been an earlier opportunity to elect exclusion that has expired by the time of the settlement notice.

This second opportunity to elect exclusion reduces the forces of inertia and ignorance that may undermine the value of a pre-settlement opportunity to elect exclusion. A decision to remain in the class is apt to be more carefully considered and is better informed when settlement terms are known.

The second opportunity to elect exclusion also recognizes the essential difference between disposition of a class member's rights through a court's adjudication and disposition by private negotiation between court-confirmed representatives and a class adversary. No matter how careful the inquiry into the settlement terms, a class-action settlement does not carry the same reassurance of justice as an adjudicated resolution. Objectors may provide important support for the court's inquiry, but attempts to encourage and support objectors may prove difficult. An opportunity to elect exclusion after the terms of a proposed settlement are known provides a valuable protection against improvident settlement that is not provided by an earlier opportunity to elect exclusion and that is not reliably provided by the opportunity to object. The opportunity to opt out of a proposed settlement may afford scant protection to individual class members when there is little realistic alternative to class litigation, other than by providing an incentive to negotiate a settlement that — by encouraging class members to remain in the class — is more likely to win approval. The protection is quite meaningful as to class members whose individual claims will support litigation by individual action, or by aggregation on some other basis, including another class action; in such actions, the decision of most class members to remain in the class may provide added assurance that the settlement is reasonable. The settlement agreement can be negotiated on terms that allow any party to withdraw from the agreement if a specified number of class members request exclusion. The negotiated right to withdraw protects the class adversary against being bound to a settlement that does not deliver the repose initially bargained for, and that may merely set the threshold recovery that all subsequent settlement demands will seek to exceed.

The opportunity to request exclusion from a proposed settlement is limited to members of a (b)(3) class. Exclusion may be requested only by individual class members; no class member may purport to opt out other class members by way of another class action. Members of a (b)(1) or (b)(2) class may seek protection by objecting to certification, the definition of the class, or the terms of the settlement.

[Alternative 1: Although the opportunity to elect exclusion from the class after settlement terms are announced should apply to most settlements, paragraph (3) allows the court to deny this opportunity if there has been an earlier opportunity to elect exclusion and there is good cause not to allow a second opportunity. Because the settlement opt-out is a valuable protection for class members, the court should be especially confident — to the extent possible on preliminary review and before hearing objections — about the quality of the settlement before denying the second opt-out opportunity. Faith in the quality and motives of class representatives and counsel is not alone enough. But the circumstances may provide particularly strong evidence that the settlement is reasonable. The facts and law may have been well developed in earlier litigation, or through extensive pretrial preparation in the class action itself. The settlement may be reached at trial, or even after trial. Parallel enforcement efforts by public agencies may provide extensive information. Such circumstances may provide strong reassurances of reasonableness that justify denial of an opportunity to elect exclusion. Denial of this opportunity may increase the prospect that the settlement will become effective, establishing final disposition of the class claims.]

[Alternative 2: The decision whether to allow a second opportunity to elect exclusion is confided to the court's discretion.]

The decision whether to permit a second opportunity to opt out should turn on the court's level of confidence in the extent of the information available to evaluate the fairness, reasonableness, and adequacy of the settlement. Some circumstances may present particularly strong evidence that the settlement is reasonable. The facts and law may have been well developed in earlier litigation, or through extensive pretrial preparation in the class action itself. The settlement may be reached at trial, or even after trial. Parallel enforcement efforts by public agencies may provide extensive information. The pre-settlement activity of class members or even class representatives may suggest that any warranted objections will be made. Other circumstances as well may enhance the court's confidence that a second opt-out opportunity is not needed./

An opportunity to elect exclusion after settlement terms are known, either as the initial opportunity or a second opportunity, may reduce the need to provide procedural support to objectors. Class members who find the settlement unattractive can protect their own interests by opting out of the class. Yet this opportunity does not mean that objectors become unimportant. It may be difficult to ensure that class members truly understand settlement terms and the risks of litigation, particularly in cases of much complexity. If most class members have small claims, moreover, the decision to elect exclusion is more a symbolic protest than a meaningful pursuit of alternative remedies.

Paragraph (4). Subdivision (e)(4) confirms the right of class members to object to a proposed settlement, voluntary dismissal, or compromise. The right is defined in relation to a disposition that, because it would bind the class, requires court approval under subdivision (e)(1)(C). If the disposition would not bind the class,

requiring approval only under the general provisions of subdivision (e)(1)(A), the court retains the authority to hear from members of a class that might benefit from continued proceedings and to allow a new class representative to pursue class certification. Objections may be made as an individual matter, arguing that the objecting class member should not be included in the class definition or is entitled to terms different than the terms afforded other class members. Individually based objections almost inevitably come from individual class members, but are not likely to provide much information about the overall reasonableness of the settlement unless there are many individual objectors. Objections also may be made in terms that effectively rely on class interests; the objector then is acting in a role akin to the role played by a court-approved class representative. Class-based objections may be the only means available to provide strong adversary challenges to the reasonableness of the settlement—the parties who have presented the agreement for approval may be hard-put to understand the possible failings of their own good-faith efforts. It seems likely that in practice many objectors will argue in terms that seem to involve both individual and class interests.

A class member may appear and object without seeking intervention. Many courts of appeals, however, have adopted a rule that recognizes standing to appeal only if the objector has won intervention in the district court. See, e.g., *In re Brand Name Prescription Drugs Antitrust Litigation*, 115 F.3d 456 (7th Cir. 1997). An objector who wishes to preserve the opportunity to appeal is well advised to seek intervention.

The important role played by objectors may justify substantial procedural support. The parties to the settlement agreement may provide access to the results of all discovery in the class action as a

means of facilitating appraisal of the strengths of the class positions on the merits. If settlement is reached early in the progress of the class action, however, there may be little discovery. Discovery in — and even the actual dispositions of — parallel litigation may provide alternative sources of information, but may not. If an objector shows reason to doubt the reasonableness of the proposed settlement, the court may allow discovery reasonably necessary to support the objections. Discovery into the settlement negotiation process should be allowed, however, only if the objector makes a strong preliminary showing of collusion or other improper behavior. An objector who wins changes in the settlement that benefit the class may be entitled to attorney fees, either under a fee-shifting statute or under the "common-fund" theory.

The need to support objectors may be reduced when class members have an opportunity to opt out of the class after settlement terms are set. The opportunity to opt out may arise because settlement occurs before the first opportunity to elect exclusion from a (b)(3) class, or may arise when a second opportunity to opt out is afforded under Rule 23(e)(3).

The important role that is played by some objectors must be balanced against the risk that objections are made for strategic purposes. Class-action practitioners often assert that a group of "professional objectors" has emerged, appearing to present objections for strategic purposes unrelated to any desire to win significant improvements in the settlement. An objection may be ill-founded, yet exert a powerful strategic force. Litigation of an objection can be costly, and even a weak objection may have a potential influence beyond what its merits would justify in light of the inherent difficulties that surround review and approval of a class settlement.

Both initial litigation and appeal can delay implementation of the settlement for months or even years, denying the benefits of recovery to class members. Delayed relief may be particularly serious in cases involving large financial losses or severe personal injuries. It has not been possible to craft rule language that distinguishes the motives for objecting, or that balances rewards for solid objections with sanctions for unfounded objections. Courts should be vigilant to avoid practices that may encourage unfounded objections. Nothing should be done to discourage the cogent objections that are an important part of the process, even when they fail. But little should be done to reward an objection merely because it succeeds in winning some change in the settlement; cosmetic changes should not become the occasion for fee awards that represent acquiescence in coercive use of the objection process. The provisions of Rule 11 apply to objectors, and courts should not hesitate to invoke Rule 11 in appropriate cases.

Subdivision (e)(4)(B) requires court approval for withdrawal of objections made under subdivision (e)(4)(A). Review follows automatically if the objections are withdrawn on terms that lead to modification of the settlement with the class. Review also is required if the objector formally withdraws the objections. A difficult uncertainty is created if the objector, having objected, simply refrains from pursuing the objections further. An objector should not be required to pursue objections after concluding that the potential advantage does not justify the effort. Review and approval should be required if the objector surrendered the objections in return for benefits that would not be available to the objector under the settlement terms available to other class members. The court may inquire whether such benefits have been accorded an objector who seems to have abandoned the objections. An objector who receives

a benefit should be treated as withdrawing the objection and may retain the benefit only if the court approves.

Approval under paragraph (4)(B) may be given or denied with little need for further inquiry if the objection and the disposition go only to a protest that the individual treatment afforded the objector under the proposed settlement is unfair because of factors that distinguish the objector from other class members. Greater difficulties arise if the objector has protested that the proposed settlement is not fair, reasonable, or adequate as to the class. Such objections augment the strategic opportunity for obstruction, and purport to represent class interests. The objections may be surrendered on terms that do not affect the class settlement or the objector's participation in the class settlement. In some situations the court may fear that other potential objectors have relied on the objections already made and seek some means to replace the defaulting objector. In most circumstances, however, an objector should be free to abandon the objections, and the court can approve withdrawal of the objections without elaborate inquiry.

Quite different problems arise if settlement of an objection provides the objector alone terms that are more favorable than the terms generally available to other class members. An illustration of the problems is provided by *Duhaime v. John Hancock Mut. Life Ins. Co.*, 183 F.3d 1 (1st Cir. 1999). The different terms may reflect genuine distinctions between the objector's position and the positions of other class members, and make up for an imperfection in the class or subclass definition that lumped all together. Different terms, however, may reflect the strategic value that objections can have. So long as an objector is objecting on behalf of the class, it is appropriate to impose on the objector a fiduciary duty to the class similar to the

duty assumed by a named class representative. The objector may not seize for private advantage the strategic power of objecting. The court should approve terms more favorable than those applicable to other class members only on a showing of a reasonable relationship to facts or law that distinguish the objector's position from the position of other class members.

Once an objector appeals, control of the proceeding lies in the court of appeals. The court of appeals may undertake review and approval of a settlement with the objector, perhaps as part of appeal settlement procedures, or may remand to the district court to take advantage of the district court's familiarity with the action and settlement.

APPOINTING COUNSEL: NEW RULE 23(g)

Rule 23. Class Actions

1

* * * * *

2

(g) Class Counsel.

3

(1) Appointing Class Counsel.

4

(A) Unless a statute provides otherwise, a court that

5

certifies a class must appoint class counsel.

6

(B) An attorney appointed to serve as class counsel must

7

fairly and adequately represent the interests of the class.

8 **(2) Appointment Procedure.**

9 (A) The court may allow a reasonable period after the
10 commencement of the action for attorneys seeking
11 appointment as class counsel to apply.

12 (B) In appointing an attorney class counsel, the court must
13 consider (i) counsel's experience in handling class actions
14 and other complex litigation, (ii) the work counsel has
15 done in identifying or investigating potential claims in this
16 case, and (iii) the resources counsel will commit to
17 representing the class, and may consider any other matter
18 pertinent to counsel's ability to fairly and adequately
19 represent the interests of the class. The court may direct
20 potential class counsel to provide information on any such
21 subject and to propose terms for attorney fees and

22 nontaxable costs. The court may also make further orders
23 in connection with selection of class counsel.

24 (C) The order appointing class counsel may include
25 provisions about the award of attorney fees or nontaxable
26 costs under Rule 23(h).

27 * * * * *

Committee Note

Subdivision (g). Subdivision (g) is new. It responds to the reality that the selection and activity of class counsel are often critically important to the successful handling of a class action. Yet until now the rule has said nothing about either the selection or responsibilities of class counsel. This subdivision recognizes the importance of class counsel, states their obligation to represent the interests of the class, and provides a framework for selection of class counsel. It also provides a method by which the court may make directions from the outset about the potential fee award to class counsel in the event the action is successful.

Paragraph (1) sets out the basic requirement that class counsel be appointed if a class is certified and articulates the obligation of class counsel to represent the interests of the class, as opposed to the potentially conflicting interests of individual class members.

Paragraph (1)(A) requires that the court appoint class counsel to represent the class. Class counsel must be appointed for all classes, including each subclass if the court certifies subclasses.

Ordinarily, the court would appoint class counsel at the same time that it certifies the class. As a matter of effective management of the action, however, it may be important for the court to designate attorneys to undertake some responsibilities during the period before class certification. This need may be particularly apparent in cases in which there is parallel individual litigation, or those in which there is more than one class action on file. In these circumstances, it may be desirable for the court to designate lead or liaison counsel during the pre-certification period.

Paragraph (1)(A) does not apply if "a statute provides otherwise." This recognizes that provisions of the Private Securities Litigation Act of 1995, Pub. L. No. 104-67, 109 Stat. 737 (1995) (codified in various sections of 15 U.S.C.), contain directives that bear on selection of a lead plaintiff and the retention of counsel. This subdivision does not purport to supersede or to affect the interpretation of those provisions, or any similar provisions of other legislation.

Paragraph 1(B) recognizes that the primary responsibility of class counsel, resulting from appointment as class counsel, is to represent the best interests of the class. The class comes into being due to the action of the court in granting class certification, and class counsel are appointed by the court to represent the class. The rule thus defines the scope and nature of the obligation of class counsel, an obligation resulting from the court's appointment and one that may

be different from the customary obligations of counsel to individual clients. See American Law Institute, Restatement (Third) of the Law Governing Lawyers, § 128 comment d(iii) (2000); *Bash v. Firstmark Standard Life Ins. Co.*, 861 F.2d 159, 161 (7th Cir. 1988) ("conflicts of interest are built into the device of the class action, where a single lawyer may be representing a class consisting of thousands of persons not all of whom will have identical interests or views").

For these reasons, the customary rules that govern conflicts of interest for attorneys must sometimes operate in a modified manner in class actions; individual class members cannot insist on the complete fealty from counsel that may be appropriate outside the class action context. See *Lazy Oil Co. v. Witco Corp.*, 166 F.3d 581, 584, 589-90 (3d Cir.), cert. denied, 528 U.S. 874 (1999) (adopting a "balanced approach" to attorney-disqualification motions in the class action context, and noting that the conflict rules do not appear to have been drafted with class action procedures in mind and that they may even be at odds with the policies underlying the class action rules); *In re Agent Orange Product Liability Litigation*, 800 F.2d 14, 19 (2d Cir. 1986) ("the traditional rules that have been developed in the course of attorneys' representation of the interests of clients outside the class action context should not be mechanically applied to the problems that arise in the settlement of class action litigation"); *In re Corn Derivatives Antitrust Litigation*, 748 F.2d 157, 164 (3d Cir. 1984) (Adams, J., concurring); see also *Pettway v. American Cast Iron Pipe Co.*, 576 F.2d 1157, 1176 (5th Cir. 1978), cert. denied, 439 U.S. 1115 (1979) ("when a potential conflict arises between the named plaintiffs and the rest of the class, the class attorney must not allow decisions on behalf of the class to rest exclusively with the named plaintiffs").

Class representatives may or may not have a preexisting attorney-client relationship with class counsel, but appointment as class counsel means that the primary obligation of counsel is to the class rather than to any individual members of it. The class representatives do not have an unfettered right to "fire" class counsel, who is appointed by the court. See *Maywalt v. Parker & Parsley Petroleum Co.*, 67 F.3d 1072, 1078-79 (2d Cir. 1995). In the same vein, the class representatives cannot command class counsel to accept or reject a settlement proposal. To the contrary, class counsel has the obligation to determine whether settlement would be in the best interests of the class as a whole. Approval of such a settlement, of course, depends on the court's review under Rule 23(e).

Until appointment as class counsel, an attorney does not represent the class in a way that makes the attorney's actions legally binding on class members. Counsel who have established an attorney-client relationship with certain class members, and those who have been appointed lead or liaison counsel as noted above, may have authority to take certain actions on behalf of some class members, but authority to act officially in a way that will legally bind the class can only be created by appointment as class counsel.

Before certification, counsel may undertake actions tentatively on behalf of the class. One frequent example is discussion of possible settlement of the action by counsel before the class is certified. Such pre-certification activities anticipate later appointment as class counsel, and by later applying for such appointment counsel is representing to the court that the activities were undertaken in the best interests of the class. By presenting such a pre-certification settlement for approval under Rule 23(e) and seeking appointment as

class counsel, for example, counsel represents that the settlement provisions are fair, reasonable, and adequate for the class.

Paragraph (2). This paragraph sets out the procedure that should be followed in appointing class counsel. Although it affords substantial flexibility, it is intended to provide a framework for appointment of class counsel in all class actions.

In a plaintiff class action the court would ordinarily appoint as class counsel only an attorney who has sought appointment. For counsel who filed the action, the materials submitted in support of the motion for class certification may suffice to justify appointment so long as the information described in paragraph (2)(B) is included. Other attorneys seeking appointment as class counsel would ordinarily have to file a formal application detailing their suitability for the position.

The court is not limited to attorneys who have sought appointment in selecting class counsel for a defendant class. The authority of the court to certify a defendant class cannot depend on the willingness of counsel to apply to serve as class counsel. The court has a responsibility to appoint appropriate class counsel for a defendant class, and paragraph (2)(B) authorizes it to elicit needed information from potential class counsel to inform its determination whom to appoint.

The rule states that the court should appoint "an attorney" as class counsel. In many instances, this will be an individual attorney. In other cases, however, appointment will be sought on behalf of an entire firm, or perhaps of numerous attorneys who are not otherwise

affiliated but are collaborating on the action. No rule of thumb exists to determine when such arrangements are appropriate; the objective is to ensure adequate representation of the class. In evaluating such applications, the court should therefore be alert to the need for adequate staffing of the case, but also to the risk of overstaffing or an ungainly counsel structure. One possibility that may sometimes be relevant to whether the court appoints a coalition is the alternative of competition for the position of class counsel. If potentially competing counsel have joined forces to avoid competition rather than to provide needed staffing for the case, the court might properly direct that they apply separately. See *In re Oracle Securities Litigation*, 131 F.R.D. 688 (N.D. Cal. 1990) (counsel who initially vied for appointment as lead counsel resisted bidding against each other rather than submitting a combined application, and submitted competing bids only under pressure from the court).

Paragraph (2)(A) provides that the court may allow a reasonable period after commencement of the action for filing applications to serve as class counsel. The purpose is to permit the filing of competing applications to afford the best possible representation for the class, but in some instances deferring appointment would not be justified. The principal example would be actions in which a proposed settlement has been negotiated before the class action is filed, justifying prompt review of the proposed settlement under Rule 23(e). Except in such situations, the court should ordinarily defer the appointment for a period sufficient to permit competing counsel to apply.

This provision should not often present difficulties; recent reports indicate that ordinarily considerable time elapses between

commencement of the action and ruling on certification. See T. Willging, L. Hooper & R. Niemic, *Empirical Study of Class Actions in Four Federal District Courts* 122 (FJC 1996) (median time from filing of complaint to ruling on class certification ranged from 7 months to 12.8 months in four districts studied). Moreover, the court may take account of the likelihood that there will be competing applications, perhaps reflecting on the nature of the action or specifics that indicate whether there are likely to be other applicants, in determining whether to defer resolution of class certification. All of these factors would bear on when a class certification decision is "practicable" under Rule 23(c)(1).

Paragraph (2)(B) articulates the basic responsibility of the court in selecting class counsel -- to appoint an attorney who will assure the adequate representation called for by paragraph (1)(B). It identifies three criteria that must be considered and invites the court to consider any other pertinent matters. Although couched in terms of the court's duty, the listing also informs counsel seeking appointment about the topics on which they need to inform the court. As indicated above, this information may be included in the motion for class certification.

The court may direct potential class counsel to provide additional information about the topics mentioned in paragraph (2)(B) or about any other relevant topic. For example, the court may direct counsel seeking appointment as class counsel to inform the court concerning any agreements they have made about a prospective award of attorney fees or nontaxable costs, as such agreements may sometimes be significant in the selection of class counsel. The court might also direct that potential class counsel indicate whether they

represent parties or a class in parallel litigation that might be coordinated or consolidated with the action before the court.

The court may also direct counsel to propose terms for a potential award of attorney fees and nontaxable costs. As adoption of Rule 23(h) recognizes, attorney fee awards are an important feature of class action practice, and attention to this subject from the outset may often be a productive technique for dealing with these issues. Paragraph (2)(C) therefore authorizes the court to provide directions about attorney fees and costs when appointing class counsel. Because there will be numerous class actions in which this information is not likely to be useful in selecting class counsel or to provide criteria for an order under paragraph (2)(C), the court need not consider it in all class actions. But the topic is mentioned in the rule because of its frequent importance, and courts should be alert to whether it is useful to direct counsel to provide such information.

Full reports on a number of the subjects that are to be covered in counsel's submissions to the court may often reveal confidential information that should not be available to the class opponent or to other parties. Examples include the work counsel has done in identifying potential claims, the resources counsel will commit to representing the class, and proposed terms for attorney fees. In order to safeguard this confidential information, the court may direct that these disclosures be made under seal and not revealed to the class adversary.

In addition, the court may make orders about how the selection process should be handled. For example, the court might direct that

separate applications be filed rather than a single application on behalf of a consortium of attorneys.

In evaluating prospective class counsel, the court should weigh all pertinent factors. No single factor should necessarily be determinative in a given case. The fact that a given attorney filed the instant action, for example, might not weigh heavily in the decision if that lawyer had not done significant work identifying or investigating claims. The resources counsel will commit to the case must be appropriate to its needs, of course, but the court should be careful not to limit consideration to lawyers with the greatest resources.

If, after review of all potential class counsel, the court concludes that none is satisfactory, it may reject all applications, recommend that an application be modified, invite new applications, or make any other appropriate order regarding selection and appointment of class counsel.

Paragraph (2)(C) builds on the appointment process by authorizing the court to include provisions regarding attorney fees in the order appointing class counsel. Courts may find it desirable to adopt guidelines for fees or nontaxable costs, or a method of monitoring class counsel's performance throughout the litigation. See *Gunter v. Ridgewood Energy Corp.*, 223 F.3d 190, 201-02 n.6 (3d Cir. 2000); Report of the Federal Courts Study Committee 104 (1990) (recommending provision of advance guidelines in appropriate cases regarding such items as the level of attorney involvement that will be compensated). Ordinarily these provisions would be limited to tentative directions regarding the potential award of attorney fees and

nontaxable costs to class counsel. In some instances, however, they might affect potential motions for attorney fees by other attorneys.

The court also might find it helpful to direct class counsel to report to the court at regular intervals on the efforts undertaken in the action. Courts that employ this method have found it an effective way to assess the performance of class counsel. It may also facilitate the court's later determination of a reasonable attorney fee, without having to absorb and evaluate a mountain of records about conduct of the case that would have been more digestible in smaller doses. Particularly if the court has directed potential class counsel to provide information on agreements with others regarding fees at the time of appointment, it might be desirable also to direct that class counsel notify the court if they enter into such agreements after appointment. Because such reports may reveal confidential information, however, it may be appropriate that they be filed under seal.

The rule does not set forth any hearing or finding requirements regarding appointment of class counsel. Because appointment of class counsel is ordinarily a feature of class certification, and therefore may be subject to an immediate appeal under Rule 23(f), district courts should ensure an adequate record of the basis for their decisions regarding selection of class counsel.

ATTORNEY FEES: NEW RULE 23(h)**Rule 23. Class Actions**

1 * * * * *

2 **(h) Attorney Fees Award.** In an action certified as a class
3 action, the court may award reasonable attorney fees and
4 nontaxable costs authorized by law or by agreement of the
5 parties as follows:

6 **(1) Motion for Award of Attorney Fees.** A claim for
7 an award of attorney fees and nontaxable costs must be
8 made by motion under Rule 54(d)(2), subject to the
9 provisions of this subdivision, at a time directed by the
10 court. Notice of the motion must be served on all parties
11 and, for motions by class counsel, given to all class
12 members in a reasonable manner.

(3) Hearing and Findings. The court may hold a hearing and must find the facts and state its conclusions of law on the motion under Rule 52(a).

22 * * * * *

Subdivision (h). Subdivision (h) is new. Fee awards are a powerful influence on the way attorneys initiate, develop, and conclude class actions. See RAND Institute for Civil Justice, *Class Action Dilemmas, Executive Summary* 24 (1999) (stating that "what judges do is the key to determining the benefit-cost ratio" in class actions, and that salutary results followed when judges "took responsibility for determining attorney fees"). Class action attorney fee awards have heretofore been handled, along with all other

attorney fee awards, under Rule 54(d)(2), but that rule is not addressed to the particular concerns of class actions. This subdivision provides a framework for fee awards in class actions. It is designed to work in tandem with new subdivision (g) on appointment of class counsel, which may afford an opportunity for the court to provide an early framework for an eventual fee award, or for monitoring the work of class counsel during the pendency of the action. In cases subject to court approval under Rule 23(e), that review process would ordinarily proceed in tandem with consideration of class counsel's fee motion.

Subdivision (h) applies to "an action certified as a class action." This is intended to include cases in which there is a simultaneous proposal for class certification and settlement even though technically the class may not be certified unless the court approves the settlement pursuant to review under Rule 23(e). As noted below, in these situations the notice to class members about class counsel's fee motion would ordinarily accompany the notice to the class about the settlement proposal itself. Deferring the filing of class counsel's fee motion until after the Rule 23(e) review is completed would therefore usually be wasteful.

This subdivision does not undertake to create any new grounds for an award of attorney fees or nontaxable costs. Instead, it applies when such awards are authorized by law or by agreement of the parties. Against that background, it provides a format for all awards of attorney fees and nontaxable costs in connection with a class action, not only the award to class counsel. In some situations, there may be a basis for making an award to other counsel whose work produced a beneficial result for the class, such as attorneys who

sought appointment as class counsel but were not appointed, or attorneys who represented objectors to a proposed settlement under Rule 23(e) or to the fee motion of class counsel. See, e.g., *Gottlieb v. Barry*, 43 F.3d 474 (10th Cir. 1994) (fee award to objectors who brought about reduction in fee awarded from settlement fund); *White v. Auerbach*, 500 F.2d 822, 828 (2d Cir. 1974) (objectors entitled to attorney fees for improving settlement). Other situations in which fee awards are authorized by law or by agreement of the parties may exist.

This subdivision authorizes an award of "reasonable" attorney fees and nontaxable costs. This is the customary term for measurement of fee awards in cases in which counsel may obtain an award of fees under the "common fund" theory that applies in many class actions, and is used in many fee-shifting statutes. See, e.g., 7B C. Wright, A. Miller & M. Kane, *Fed. Prac. & Pro.* § 1803 at 507-08. Depending on the circumstances, courts have approached the determination of what is reasonable in different ways. See generally A. Hirsch & D. Sheehy, *Awarding Attorneys' Fees and Managing Fee Litigation* (Fed. Jud. Ctr. 1994). In particular, there is some variation among courts about whether in "common fund" cases the court should use the lodestar or a percentage method of determining what fee is reasonable. See *Powers v. Eichan*, 229 F.3d 1249 (9th Cir. 2000) (district court did not abuse its discretion by using percentage method); *Goldberger v. Integrated Resources, Inc.*, 209 F.3d 43 (2d Cir. 2000) (in common fund cases the district court may use either the lodestar or the percentage approach); *Johnson v. Comerica Mortgage Corp.*, 83 F.3d 241, 244-46 (8th Cir. 1996) (district court has discretion to select either percentage or lodestar approach); *Camden I Condominium Ass'n v. Dunkle*, 946 F.2d 768

(11th Cir. 1991) (percentage approach is supported by "better reasoned" authority). Ultimately the courts may conclude that a combination of methods -- lodestar and percentage -- should be employed in a blended manner to provide the best possible assessment of a reasonable fee. The rule does not attempt to resolve the question whether the lodestar or percentage approach, or some blending of the two, should be viewed as preferable, leaving that evolving determination to the courts.

Although the rule does not attempt to supplant caselaw developments on fee measurement, it is premised on the singular importance of judicial review of fee awards to the healthy operation of the class action process. Ultimately the class action is a creation of equity for which the courts bear a special responsibility. See 7B Fed. Prac. & Pro. § 1803 at 494 ("The court's authority to reimburse the parties stems from the fact that the class action device is a creature of equity and the allowance of attorney-related costs is considered part of the historic equity power of the federal courts."). "In a class action, whether the attorneys' fees come from a common fund or are otherwise paid, the district court must exercise its inherent authority to assure that the amount and mode of payment of attorneys' fees are fair and proper." *Zucker v. Occidental Petroleum Corp.*, 192 F.3d 1323, 1328 (9th Cir. 1999); see also *In re Cendant Corp. PRIDES Litigation*, 243 F.3d 722, 730 (3d Cir. 2001) (referring to "the special position of the courts in connection with class action settlements and attorneys' fee awards"). Accordingly, "a thorough review of fee applications is required in all class action settlements." *In re General Motors Corp. Pick-Up Truck Fuel Tank Litigation*, 55 F.3d 768, 819 (3d Cir.), *cert. denied*, 516 U.S. 824 (1995). Indeed, improved judicial shouldering of this responsibility may be a key

element in improving the class action process. See RAND, *Class Action Dilemmas*, supra, at 33 ("The single most important action that judges can take to support the public goals of class action litigation is to reward class action attorneys only for lawsuits that actually accomplish something of value to class members and society.").

Courts discharging this responsibility have focused on a variety of factors. Indeed, in many circuits there is already a recognized list of factors the district courts are to address in deciding fee motions. Without attempting to list all that properly might be considered, it may be helpful to identify some that are often important in class actions.

One fundamental focus is the result actually achieved for class members, a basic consideration in any case in which fees are sought on the basis of a benefit achieved for class members. See RAND, *Class Action Dilemmas*, supra, at 34-35. The Private Securities Litigation Reform Act of 1995 explicitly makes this factor a cap for a fee award in actions to which it applies. See 15 U.S.C. §§ 77z-1(a)(6); 78u-4(a)(6) (fee award should not exceed a "reasonable percentage of the amount of any damages and prejudgment interest actually paid to the class"). For a percentage approach to fee measurement, results achieved is the basic starting point.

In many instances, the court may need to proceed with care in assessing the value conferred on class members. Settlement regimes that provide for future payments, for example, may not result in significant actual payments to class members. In this connection, the court may need to scrutinize the manner and operation of any applicable claims procedure. In some cases, it may be appropriate to

defer some portion of the fee award until actual payouts to class members are known. "Coupon" settlements may call for careful scrutiny to verify the actual value to class members of the resulting coupons. If there is no secondary market for coupons, and if there are significant limitations on using them, a substantial discount may be appropriate. It may be that only unusual circumstances would make it appropriate to value the settlement as the sum of the face value of all coupons. On occasion the court's Rule 23(e) review will provide a solid basis for this sort of evaluation, but in any event it is also important to assessing the fee award for the class.

At the same time, it is important to recognize that in some class actions the monetary relief obtained is not the sole determinant of an appropriate attorney fees award. Cf. *Blanchard v. Bergeron*, 489 U.S. 87, 95 (1989) (cautioning in an individual case against an "undesirable emphasis" on "the importance of the recovery of damages in civil rights litigation" that might "shortchange efforts to seek effective injunctive or declaratory relief").

Courts also regularly consider the time counsel reasonably expended on the action -- the lodestar analysis. Even a court that initially uses a percentage approach might well choose to "cross-check" that initial determination with consideration of the time needed for the action. Similarly, a court that begins with a lodestar approach may also emphasize the results obtained in deciding whether the resulting lodestar figure would be a reasonable award. The attorney work to be considered under this factor would include pre-appointment efforts of attorneys appointed as class counsel. This analysis would ordinarily also take account of the professional quality of the representation.

Any objections submitted pursuant to paragraph (2) should also be considered. Often these objections would shed light on topics addressed by the other factors. Sometimes objectors will provide additional information to the court. Owing to the court's special duty for supervising fee awards in class actions, however, it has been held that the absence of objections does not relieve the court of its responsibility for scrutinizing the fee motion. See *Zucker v. Occidental Petroleum Corp.*, 192 F.3d 1323, 1328-29 (9th Cir. 1999) ("This duty of the court exists independently of any objection.").

The risks borne by class counsel are also often considered in setting an appropriate fee in common fund cases. In some cases, the probability of a successful result may be very high, making any enhancement of the fee on this ground inappropriate. But when there is a significant risk of nonrecovery, that factor has sometimes been important in determining the fee, or in interpreting the lodestar as a cross-check on the fee determined by the percentage method.

Any terms proposed by counsel in seeking appointment as class counsel, and any directions or orders made by the court in connection with appointing class counsel, should also weigh on an eventual fee award. The process of appointing class counsel under Rule 23(g) contemplates that these topics will often be considered at that point, and the resulting directives should provide a starting point for fee motions under this subdivision.

Courts have also given weight to agreements among the parties regarding the fee motion, and to agreements between class counsel and others about the fees claimed by the motion. Rule 54(d)(2)(B) provides: "If directed by the court, the motion shall also disclose the

terms of any agreement with respect to fees to be paid for the services for which claim is made." The agreement by a settling party not to oppose a fee application up to a certain amount, for example, is worthy of consideration, but the court remains responsible to determine a reasonable fee. "Side agreements" regarding fees provide at least perspective pertinent to other factors such as the contingency of the representation and financial risks borne by class counsel. These agreements may sometimes indicate that others are reaping a windfall due to a substantial award while class counsel are not significantly compensated for their efforts. If that appears to be true, the court may have authority to make appropriate adjustments.

In addition, courts may take account of the fees charged by class counsel or other attorneys for representing individual claimants or objectors in the case. The court-awarded fee will often not be the only fee earned by class counsel or by other attorneys in connection with the action. Class counsel may have fee agreements with individual class members, while other class members may have fee agreements with their own lawyers. In determining a fee for class counsel, the court's objective is to ensure an overall fee that is fair for counsel and equitable within the class. In some circumstances individual fee agreements between class counsel and class members might have provisions inconsistent with those goals, and the court might determine that adjustments were necessary as a result. In other circumstances, the court might determine that fees called for by contracts between class members and other lawyers would either deplete the funds remaining to pay class counsel, or deplete the net proceeds for class members, in ways that call for adjustment.

Courts have also referred to the awards in similar cases for aid in determining a reasonable fee award. See, e.g., *In re Cendant Corp. PRIDES Litigation*, 243 F.3d 722, 737-38 (3d Cir. 2001) (including chart of attorney fee awards in cases in which the common fund exceeded \$100 million).

Finally, it is important to scrutinize separately the application for an award covering nontaxable costs. These charges can sometimes be considerable. They may often be suitable for initial prospective regulation through the order appointing class counsel. See Rule 23(g)(2)(C). If so, those directives should be a presumptive starting point in determining what is an appropriate award. In any event, the court ought only authorize payment of nontaxable costs that are reasonable.

Paragraph (1). Any claim for an award of attorney fees must be sought by motion under Rule 54(d)(2), but owing to the distinctive features of class action fee motions the provisions of this subdivision control disposition of fee motions in class actions. As noted above, this includes awards not only to class counsel, but to any other attorney who seeks an award for work in connection with the class action.

The court should direct when the fee motion be filed. For motions by class counsel in cases subject to court review of a proposed settlement under Rule 23(e), it would ordinarily be important to require the filing of at least the initial motion in time for inclusion of information about the motion in the notice to the class about the proposed settlement that is required by Rule 23(e). It may, however, be sensible in some such cases to defer filing of some

supporting materials until a later date. In cases litigated to judgment, the court might also want class counsel's motion on file promptly so that notice to the class under this subdivision can be given. If other counsel will seek awards, a different schedule may be appropriate. For example, if fees are sought by an objector to the proposed settlement, or by an objector to a fee motion, it is important to allow sufficient time after the ruling on the objection for the fee motion to be filed.

Besides service of the motion on all parties, notice to the class "in a reasonable manner" is required with regard to class counsel's motion for attorney fees. Because members of the class have an interest in the arrangements for payment of class counsel whether that payment comes from the class fund or is made directly by another party, notice is required in all instances. As noted above, in cases in which settlement approval is contemplated under Rule 23(e), the notice regarding class counsel's fee motion ordinarily would be combined with notice of the proposed settlement, and the provision regarding notice to the class is parallel to the requirements for notice under Rule 23(e). In adjudicated class actions, the court may calibrate the notice to avoid undue expense while assuring that a suitable proportion of class members are likely to be apprised of the fee motion.

Paragraph (2). A class member and any party from whom payment is sought may object to the fee motion. Other parties -- for example, nonsettling defendants -- may not object because they have no sufficient interest in the amount the court awards. The rule does not specify a time limit for making an objection, but it would usually be important to set one. If a class member wishes to preserve the

right to appeal should an objection be rejected, it may be necessary for the class member to seek to intervene in addition to objecting. For those purposes, an objection would ordinarily have to be made formally by filing in court, rather than by letter to counsel or the court.

The court may allow an objector discovery relevant to the objections. In determining whether to allow such discovery, the court should weigh the need for the information against the cost and delay that would attend discovery. *See* Rule 26(b)(2). One factor in determining whether to authorize discovery would be the completeness of the material submitted in support of the fee motion. If the motion provides thorough information, the burden should be on the objector to justify discovery to obtain further information. Unlimited discovery is not a usual feature of fee disputes. *See In re Thirteen Appeals Arising out of the San Juan DuPont Plaza Hotel Fire Litigation*, 56 F.3d 295, 303-04 (1st Cir. 1995).

Paragraph (3). Whether or not there are formal objections, the court must determine whether a fee award is justified and, if so, set a reasonable fee. The rule does not require a formal hearing in all cases, leaving the question whether to hold a hearing to depend on the circumstances of the case. *See Sweeny v. Athens Regional Medical Ctr.*, 917 F.2d 1560, 1566 (11th Cir. 1990) ("[T]he more complex the disputed factual issues, the more necessary it is for the court to hold an evidentiary hearing."). In order to permit adequate appellate review, the court must make findings and conclusions under Rule 52(a). *See In re Cendant Corp. PRIDES Litigation*, 243 F.3d 722, 731 (3d Cir. 2001) ("the cases make clear that reviewing courts retain an interest -- a most special and predominant interest -- in the fairness

of class action settlements and attorneys' fee awards"); *Gunter v. Ridgewood Energy Corp.*, 223 F.3d 190, 196 (3d Cir. 2000) ("it is incumbent upon a district court to make its reasoning and application of the fee-awards jurisprudence clear, so that we, as a reviewing court, have a sufficient basis to review for abuse of discretion").

Paragraph (4). By incorporating Rule 54(d)(2), this provision gives the court broad authority to obtain assistance in determining the appropriate amount to award. If a master is to be used to assist in resolving the basic question whether an award should be made to certain moving parties, the appointment must be made under Rule 53. If the court needs assistance in compiling or analyzing detailed data to determine a reasonable award, this option is available. *See* Report of the Federal Courts Study Committee 104 (1990) (recommending consideration of using magistrate judges or special masters as taxing masters). In deciding whether to direct submission of such questions to a special master or magistrate judge, the court should give appropriate consideration to the cost and delay that such a process would entail.

RULE 51

The Rule 51 project began with a request from the Ninth Circuit Judicial Council. Reviewing local district rules, the Ninth Circuit found that many districts had rules that require submission of proposed jury instructions before trial begins. The Council was concerned that these rules may be invalid in light of Rule 51's provision for filing requests "[a]t the close of the evidence or at such earlier time *during trial* as the court reasonably directs." The Advisory Committee easily concluded that there is no apparent reason to leave this practice dependent on local rules. The conclusion to

recommend authority to direct submission before trial flowed almost as easily. Once consideration of Rule 51 was launched, and spurred by parallel consideration of Criminal Rule 30, the Advisory Committee undertook a more thorough review. In the end, it concluded that Rule 51 should be revised to state more clearly what it means now, and also to include a few new provisions.

Rule 51 can be read easily only by those who already know what it means. A party who wants an issue covered by instructions must do both of two things: make a timely request, and then separately object to failure to give the request as made. The cases that explain the need to renew the request by way of objection suggest that repetition is needed in part to ensure that the court has not simply forgotten the request or its intention to give the instruction, and in part to show the court that it has failed in its attempt to give the substance of a requested instruction in better form. An attempt to address an omitted issue by submissions to the court after the request deadline fails because it is not an "objection" but an untimely request.

Reading the text of Rule 51 is difficult with respect to the request and objection requirements. It is not possible as to the "plain error" doctrine. Many circuits recognize a "plain," "clear," or "fundamental" error doctrine that allows reversal despite failure to comply with Rule 51. This doctrine is not reflected at all in the text of Rule 51, but is explicit in the general "plain errors" provision of Criminal Rule 52. The contrast between Criminal Rule 52 and Rule 51 has led some circuits to reject the plain error doctrine for civil jury instructions.

Although unlikely, it also is possible that the formal requirements of Rule 51 may discourage the timid from making

untimely requests that would be granted if made. Requests framed as objections may well be given, despite the risk that tardy requests will lead the court into error, confuse the jury, or at least unduly emphasize one issue.

Proposed Rule 51 goes beyond clarification of the relationship between requests and objections and express adoption of the "plain error" standard. Subdivision (b)(1) requires the court to inform the parties of all instructions, not only action on requests, before instructing the jury and before jury arguments. Subdivision (b)(3) recognizes the practice of instructing the jury "at any time after trial begins." Subdivision (c)(2) elaborates on the time for objections. Subdivision (d)(2) seeks to articulate the principle that an objection is not required if "the court made a definitive ruling on the record rejecting the request."

Rule 51

- 1 **~~Rule 51. Instructions to Jury: Objection~~**
- 2 ~~— At the close of the evidence or at such earlier time~~
- 3 ~~during the trial as the court reasonably directs, any party may~~
- 4 ~~file written requests that the court instruct the jury on the law~~
- 5 ~~as set forth in the requests. The court shall inform counsel of~~
- 6 ~~its proposed action upon the requests prior to their arguments~~
- 7 ~~to the jury. The court, at its election, may instruct the jury~~

8 ~~before or after argument, or both. No party may assign as~~
9 ~~error the giving or the failure to give an instruction unless that~~
10 ~~party objects thereto before the jury retires to consider its~~
11 ~~verdict, stating distinctly the matter objected to and the~~
12 ~~grounds of the objection. Opportunity shall be given to make~~
13 ~~the objection out of the hearing of the jury.~~

14 **Rule 51. Instructions to Jury; Objections; Preserving a**
15 **Claim of Error**

16 **(a) Requests.**

17 (1) A party may, at the close of the evidence or at an
18 earlier reasonable time that the court directs, file and
19 furnish to every other party written requests that the
20 court instruct the jury on the law as set forth in the
21 requests.

22 (2) After the close of the evidence, a party may:

23 (A) file requests for instructions on issues that
24 could not reasonably have been anticipated at an
25 earlier time for requests set under Rule 51(a)(1),
26 and
27 (B) with the court's permission file untimely
28 requests for instructions on any issue.

29 **(b) Instructions.** The court:

30 (1) must inform the parties of its proposed instructions
31 and proposed action on the requests before instructing
32 the jury and before final jury arguments;
33 (2) must give the parties an opportunity to object on the
34 record and out of the jury's hearing to the proposed
35 instructions and actions on requests before the
36 instructions and arguments are delivered; and
37 (3) may instruct the jury at any time after trial begins
38 and before the jury is discharged.

39 **(c) Objections.**

40 **(1) A party who objects to an instruction or the failure**
41 **to give an instruction must do so on the record, stating**
42 **distinctly the matter objected to and the grounds of the**
43 **objection.**

44 **(2) An objection is timely if:**

45 **(A) a party that has been informed of an**
46 **instruction or action on a request before the jury is**
47 **instructed and before final jury arguments, as**
48 **provided by Rule 51(b)(1), objects at the**
49 **opportunity for objection required by Rule**
50 **51(b)(2); or**

51 **(B) a party that has not been informed of an**
52 **instruction or action on a request before the time**
53 **for objection provided under Rule 51(b)(2) objects**

54 promptly after learning that the instruction or
55 request will be, or has been, given or refused.

56 **(d) Preserving a Claim of Error; Plain Error.** A party may
57 assign as error:

58 (1) an error in an instruction actually given if that party
59 made a proper objection under Rule 51(c);

60 (2) a failure to give an instruction if that party made a
61 proper request under Rule 51(a), and — unless the court
62 made a definitive ruling on the record rejecting the
63 request — also made a proper objection under Rule
64 51(c); or

65 (3) a plain error in or omission from the instructions
66 affecting substantial rights that has not been preserved
67 as required by Rule 51(d)(1) or (2).

Committee Note

Rule 51 is revised to capture many of the interpretations that have emerged in practice. The revisions in text will make uniform the conclusions reached by a majority of decisions on each point. Additions also are made to cover some practices that cannot now be anchored in the text of Rule 51.

Requests. Subdivision (a) governs requests. Apart from the plain error doctrine recognized in subdivision (d)(3), a court is not obliged to instruct the jury on issues raised by the evidence unless a party requests an instruction. The revised rule recognizes the court's authority to direct that requests be submitted before trial. Particularly in complex cases, pretrial requests can help the parties prepare for trial. Trial also may be shaped by severing some matters for separate trial, or by directing that trial begin with issues that may warrant disposition by judgment as a matter of law; see Rules 16(c)(14) and 50(a). It seems likely that the deadline for pretrial requests will often be connected to a final pretrial conference.

The close-of-the-evidence deadline may come before trial is completed on all potential issues. Trial may be formally bifurcated or may be sequenced in some less formal manner. The close of the evidence is measured by the occurrence of two events: completion of all intended evidence on an identified phase of the trial and impending submission to the jury with instructions.

The risk in directing a pretrial request deadline is that unanticipated trial evidence may raise new issues or reshape issues the parties thought they had understood. Even if there is no unanticipated evidence, a party may seek to raise or respond to an unanticipated issue that is suggested by court, adversary, or jury. The need for a pretrial request deadline may not be great in an action that

involves well-settled law that is familiar to the court and not disputed by the parties. Courts need not insist on pretrial requests in all cases. Even if the request time is set before trial or early in the trial, subdivision (a)(2)(A) permits requests after the close of the evidence to address issues that could not reasonably have been anticipated at the earlier time for requests set by the court.

Subdivision (a)(2)(B) expressly recognizes the court's discretion to act on an untimely request. Untimely requests are often accepted, at times by acting on an objection to the failure to give an instruction on an issue that was not framed by a timely request. This indulgence must be set against the proposition that an objection alone is sufficient only as to matters actually stated in the instructions. This proposition is stated in present Rule 51, but in a fashion that has misled even the most astute attorneys. Rule 51 now says that no party may assign as error the failure to give an instruction unless that party objects thereto. It is easy to read into this provision an implication that it is sufficient to "object" to the failure to give an instruction. But even if framed as an objection, a request to include matter omitted from the instructions is just that, a request, and is untimely after the close of the evidence or the earlier time directed by the court. The most important consideration in exercising the discretion confirmed by subdivision (a)(2)(B) is the importance of the issue to the case — the closer the issue lies to the "plain error" that would be recognized under subdivision (d)(3), the better the reason to give an instruction. The cogency of the reason for failing to make a timely request also should be considered — the earlier the request deadline, the more likely it is that good reason will appear for failing to recognize an important issue. Courts also must remain wary, however, of the risks posed by tardy requests. Hurried action in the closing minutes of trial may invite error. A jury may be confused by

a tardy instruction made after the main body of instructions, and in any event may be misled to focus undue attention on the issues isolated and emphasized by a tardy instruction. And if the instructions are given after arguments, the parties may have framed the arguments in terms that did not anticipate the instructions that came to be given. To be considered under subdivision (a)(2)(B) a request should be made before final instructions and before final jury arguments. What is a "final" instruction and argument depends on the sequence of submitting the case to the jury. If separate portions of the case are submitted to the jury in sequence, the final arguments and final instructions are those made on submitting to the jury the portion of the case addressed by the arguments and instructions.

Instructions. Subdivision (b)(1) requires the court to inform the parties, before instructing the jury and before final jury arguments related to the instruction, of the proposed instructions as well as the proposed action on instruction requests. The time limit is addressed to final jury arguments to reflect the practice that allows interim arguments during trial in complex cases; it may not be feasible to develop final instructions before such interim arguments. It is enough that counsel know of the intended instructions before making final arguments addressed to the issue. If the trial is sequenced or bifurcated, the final arguments addressed to an issue may occur before the close of the entire trial.

Subdivision (b)(2) complements subdivision (b)(1) by carrying forward the opportunity to object established by present Rule 51. It makes explicit the opportunity to object on the record, ensuring a clear memorial of the objection.

Subdivision (b)(3) reflects common practice by authorizing instructions at any time after trial begins and before the jury is discharged. Preliminary instructions may be given at the beginning of the trial, a device that may be a helpful aid to the jury. In cases of unusual length or complexity, interim instructions also may be made during the course of trial. Supplemental instructions may be given during jury deliberations, and even after initial deliberations if it is appropriate to resubmit the case for further deliberations. The present provision that recognizes the authority to deliver "final" jury instructions before or after argument, or at both times, is included within this broader provision.

Objections. Subdivision (c) states the right to object to an instruction or the failure to give an instruction. It carries forward the formula of present Rule 51 requiring that the objection state distinctly the matter objected to and the grounds of the objection, and makes explicit the requirement that the objection be made on the record. The provisions on the time to object make clear that it is timely to object promptly after learning of an instruction or action on a request when the court has not provided advance information as required by subdivision (b)(1). The need to repeat a request by way of objection is mollified, but not discarded, by new subdivision (d)(2).

Preserving a claim of error and plain error. Many cases hold that a proper request for a jury instruction is not alone enough to preserve the right to appeal failure to give the instruction. The request must be renewed by objection. This doctrine is appropriate when the court may not have sufficiently focused on the request, or may believe that the request has been granted in substance although in different words. But this doctrine may also prove a trap for the unwary who fail to add an objection after the court has made it clear

that the request has been considered and rejected on the merits. Subdivision (d)(2) establishes authority to review the failure to grant a timely request, despite a failure to add an objection, when the court has made a definitive ruling on the record rejecting the request.

Many circuits have recognized that an error not preserved under Rule 51 may be reviewed in exceptional circumstances. The foundation of these decisions is that a district court owes a duty to the parties, to the law, and to the jury to give correct instructions on the fundamental elements of an action. The language adopted to capture these decisions in subdivision (d)(3) is borrowed from Criminal Rule 52. Although the language is the same, the context of civil litigation often differs from the context of criminal prosecution; actual application of the plain-error standard takes account of the differences.

The court's duty to give correct jury instructions in a civil action is shaped by at least four factors.

The factor most directly implied by a "plain" error rule is the obviousness of the mistake. Obviousness reduces the need to rely on the parties to help the court with the law, and also bears on society's obligation to provide a reasonably learned judge. Obviousness turns not only on how well the law is settled, but also on how familiar the particular area of law should be to most judges. Clearly settled but exotic law often does not generate obvious error. Obviousness also depends on the way the case was presented at trial and argued.

The importance of the error is a second major factor. Importance must be measured by the role the issue plays in the specific case; what is fundamental to one case may be peripheral in

another. Importance is independent of obviousness. A sufficiently important error may justify reversal even though it was not obvious. The most likely example involves an instruction that was correct under law that was clearly settled at the time of the instructions, so that request and objection would make sense only in hope of arguing for a change in the law. If the law is then changed in another case or by legislation that has retroactive effect, reversal may be warranted.

The costs of correcting an error reflect a third factor that is affected by a variety of circumstances. If a complete new trial must be had for other reasons, ordinarily an instruction error at the first trial can be corrected for the second trial without significant cost. A Rule 49 verdict may enable correction without further proceedings.

In a case that seems close to the fundamental error line, account also may be taken of the impact a verdict may have on nonparties. Common examples are provided by actions that attack government actions or private discrimination.

RULE 53

The Rule 53 project began several years ago, prompted by observations addressed to the committee by two of the local committees formed to develop Civil Justice Reform Act plans. In working through the Civil Rules, these committees observed that Rule 53 does not describe the uses of special masters that have grown up over the years. Rule 53 was developed to govern the use of trial masters who hear trial testimony and report recommended findings. The Supreme Court has severely limited resort to trial masters. But masters have come to be used increasingly for pretrial and post-judgment purposes. A detailed draft revising Rule 53 was prepared

and reviewed by many people with extensive experience in the use of special masters. The Federal Judicial Center did a study that was shaped by the premises adopted in the draft rule, and confirmed that special masters often are used for purposes not clearly contemplated by Rule 53. See Willging, Hooper, Leary, Miletich, Reagan, & Shapard, *Special Masters' Incidence and Activity, Report to the Judicial Conference's Committee on Civil Rules and Its Subcommittee on Special Masters* (Federal Judicial Center 2000). Against this background, a Rule 53 Subcommittee went to work on the initial draft. Under the leadership first of Judge Roger Vinson and then Judge Shira Scheindlin, the Rule 53 draft has been pared down, omitting many details and focusing on standards for appointment and review. The intervening provisions describing the powers that can be assigned to a special master reflect the provisions of present Rule 53, but are recast in shorter and more open terms. The provisions relating appointment of special masters to the responsibilities borne by magistrate judges elaborate extensively on the brief provision in present Rule 53(f).

One part of the proposal that deserves special mention appears in draft Rule 53(a)(1)(B). This provision limits the use of trial masters to actions to be tried to the court. The present provision for appointment of a trial master in a jury trial is deleted, except where a statute provides otherwise; if this recommendation is adopted, a trial master could be appointed in a jury-tried case only as authorized by statute or with the consent of the parties. The reasons for this change are expressed in the draft Committee Note. The recommendation to delete the present Rule 53 provisions for trial masters in jury cases is not intended to close off further exploration of more creative models. The role of the jury in complex litigation may be enhanced by providing neutral advice under the court's auspices. The most

interesting proposals combine the roles of master and court-appointed expert witness. In rough outline, the person appointed by the court would have authority to investigate as an expert might do, and to compel discovery and testimony as a master might do. The recommendations to the jury would be presented as testimony, subject to cross-examination. The underlying information gathered by the witness would be presented to the jury to the extent designated by the witness, any party, or the court. Such proposals as this will be difficult to develop, and will require collaboration among at least the Evidence and Civil Rules Committees. Any attempt to pursue them must lie in the future.

This proposal is not designed to encourage — nor, for that matter, to discourage — use of special masters. It is designed to reflect contemporary practice, and to establish a framework to regularize the practice.

Proposed Rule 53(g)(3) would change the presumed standard for review of a master's findings of fact or recommended findings of fact. Two alternative versions are recommended for publication. The first establishes *de novo* review unless the order of appointment establishes a clear-error standard or unless the parties stipulate with the court's consent that the master's findings will be final. The second alternative seeks to establish a parallel to the relationships between a magistrate judge and a district judge. The court must decide *de novo* fact findings or recommendations that bear on substantive issues, unless the order of appointment establishes clear-error review or the parties stipulate with the court's consent that the master's findings will be final. A clear-error standard is adopted for fact findings or recommendations on non-substantive matters, unless the order of appointment establishes *de novo* review, the court

receives evidence, or the parties stipulate with the court's consent that the findings will be final.

Both alternative versions of Rule 53(g)(3) increase the court's responsibility for fact matters. Present Rule 53(e)(2) — aimed at trial masters — establishes a clear-error standard of review in nonjury actions. Present Rule 53(e)(4) allows the parties to stipulate to finality without requiring the court's assent. The Committee hopes that comments will be directed to these changes as well as to the choice between the alternative versions.

Proposed Rule 53(g)(5) is recommended for publication for comment, but set in brackets to solicit comment on the need for any provision defining the standard to review procedural rulings by a master.

The second sentence of proposed Rule 53(i) raises sensitive questions about the role of magistrate judges as masters. 28 U.S.C. § 636(b)(2) provides that a district judge may designate a magistrate judge to serve as a special master pursuant to provisions of Title 28 and the Civil Rules. As published, the second sentence of Rule 53(i) would supersede this provision in part by allowing appointment of a magistrate judge as special master — absent authority in some statute other than § 636(b)(2) — only for duties that cannot be performed in the capacity of magistrate judge. This approach reflects several concerns about the integration of two different institutions. Courts have long used nonjudicial officers as masters to perform functions that have changed over time. Magistrate judges are public judicial officers whose role has arisen and expanded only in the last few decades. Many of the functions that have been assigned to masters could be performed by a magistrate judge, subject to specific

statutory directions and limits. The statutory role of magistrate judges should not be easily diluted by recharacterizing the magistrate judge as a special master. When party consent is required to permit assignment to a magistrate judge — as for trial of a civil action — the consent requirement should not be evaded by appointing the magistrate judge as master to perform the same assignment without party consent. Neither should statutory review standards be evaded by directing that a magistrate judge act as master rather than as magistrate judge. This approach, however, is subject to cogent objections. Appointment of a magistrate judge as special master spares the parties the expense of master fees, and ensures that the master is a neutral and experienced judicial officer. The challenge of integrating magistrate judges with Rule 53 is important and sensitive. It will be helpful to have comment on at least three possible approaches: (1) Simply delete the second sentence of proposed Rule 53(i), leaving these questions to the evolution of developing practice and experience. (2) Leave the second sentence as it is published. (3) Revise the second sentence to provide that a magistrate judge can be appointed as master only when specifically authorized by a statute other than § 636(b)(2). 42 U.S.C.A. § 2000e-5(f)(5) is an example.

Amendment of Rule 53 will require technical conforming changes in two rules that cross-refer to specific subdivisions of present Rule 53. These amendments are set out at the end of the Rule 53 materials.

Rule 53. Masters

- 1 ~~(a) Appointment and Compensation.~~ The court in which
- 2 any action is pending may appoint a special master therein.

3 ~~As used in these rules, the word "master" includes a referee,~~
4 ~~an auditor, an examiner, and an assessor. The compensation~~
5 ~~to be allowed to a master shall be fixed by the court, and shall~~
6 ~~be charged upon such of the parties or paid out of any fund or~~
7 ~~subject matter of the action, which is in the custody and~~
8 ~~control of the court as the court may direct; provided that this~~
9 ~~provision for compensation shall not apply when a United~~
10 ~~States magistrate judge is designated to serve as a master.~~
11 ~~The master shall not retain the master's report as security for~~
12 ~~the master's compensation; but when the party ordered to pay~~
13 ~~the compensation allowed by the court does not pay it after~~
14 ~~notice and within the time prescribed by the court, the master~~
15 ~~is entitled to a writ of execution against the delinquent party.~~
16 **~~(b) Reference.~~** ~~A reference to a master shall be the~~
17 ~~exception and not the rule. In actions to be tried by a jury, a~~
18 ~~reference shall be made only when the issues are complicated;~~

~~in actions to be tried without a jury, save in matters of account and of difficult computation of damages, a reference shall be made only upon a showing that some exceptional condition requires it. Upon the consent of the parties, a magistrate judge may be designated to serve as a special master without regard to the provisions of this subdivision.~~

~~(c) **Powers.** The order of reference to the master may specify or limit the master's powers and may direct the master to report only upon particular issues or to do or perform particular acts or to receive and report evidence only and may fix the time and place for beginning and closing the hearings and for the filing of the master's report. Subject to the specifications and limitations stated in the order, the master has and shall exercise the power to regulate all proceedings in every hearing before the master and to do all acts and take all measures necessary or proper for the efficient performance of~~

35 ~~the master's duties under the order. The master may require~~
36 ~~the production before the master of evidence upon all matters~~
37 ~~embraced in the reference, including the production of all~~
38 ~~books, papers, vouchers, documents, and writings applicable~~
39 ~~thereto. The master may rule upon the admissibility of~~
40 ~~evidence unless otherwise directed by the order of reference~~
41 ~~and has the authority to put witnesses on oath and may~~
42 ~~examine them and may call the parties to the action and~~
43 ~~examine them upon oath. When a party so requests, the~~
44 ~~master shall make a record of the evidence offered and~~
45 ~~excluded in the same manner and subject to the same~~
46 ~~limitations as provided in the Federal Rules of Evidence for~~
47 ~~a court sitting without a jury.~~

48 ~~**(d) Proceedings.**~~

49 ~~——(1) **Meetings.** When a reference is made, the clerk shall~~
50 ~~forthwith furnish the master with a copy of the order of~~

51 ~~reference. Upon receipt thereof unless the order of~~
52 ~~reference otherwise provides, the master shall forthwith~~
53 ~~set a time and place for the first meeting of their parties~~
54 ~~or their attorneys to be held within 20 days after the date~~
55 ~~of the order of reference and shall notify the parties or~~
56 ~~their attorneys. It is the duty of the master to proceed~~
57 ~~with all reasonable diligence. Either party, on notice to~~
58 ~~the parties and master, may apply to the court for an~~
59 ~~order requiring the master to speed the proceedings and~~
60 ~~to make the report. If a party fails to appear at the time~~
61 ~~and place appointed, the master may proceed ex parte or,~~
62 ~~in the master's discretion, adjourn the proceedings to a~~
63 ~~future day, giving notice to the absent party of the~~
64 ~~adjournment.~~

65 ~~——(2) **Witnesses.** The parties may procure the attendance~~
66 ~~of witnesses before the master by the issuance and~~

67 service of subpoenas as provided in Rule 45. If without
68 adequate excuse a witness fails to appear or give
69 evidence, the witness may be punished as for a contempt
70 and be subjected to the consequences, penalties, and
71 remedies provided in Rules 37 and 45.

72 ~~(3) **Statement of Accounts.** When matters of~~
73 ~~accounting are in issue before the master, the master~~
74 ~~may prescribe the form in which the accounts shall be~~
75 ~~submitted and in any proper case may require or receive~~
76 ~~in evidence a statement by a certified public accountant~~
77 ~~who is called as a witness. Upon objection of a party to~~
78 ~~any of the items thus submitted or upon a showing that~~
79 ~~the form of statement is insufficient, the master may~~
80 ~~require a different form of statement to be furnished, or~~
81 ~~the accounts or specific items thereof to be proved by~~
82 ~~oral examination of the accounting parties or upon~~

83 ~~written interrogatories or in such other manner as the~~
84 ~~master directs.~~

85 ~~(e)~~ **Report.**

86 ~~— (1) Contents and Filing.~~ The master shall prepare a
87 ~~report upon the matters submitted to the master by the~~
88 ~~order of reference and, if required to make findings of~~
89 ~~fact and conclusions of law, the master shall set them~~
90 ~~forth in the report. The master shall file the report with~~
91 ~~the clerk of the court and serve on all parties notice of~~
92 ~~the filing. In an action to be tried without a jury, unless~~
93 ~~otherwise directed by the order of reference, the master~~
94 ~~shall file with the report a transcript of the proceedings~~
95 ~~and of the evidence and the original exhibits. Unless~~
96 ~~otherwise directed by the order of reference, the master~~
97 ~~shall serve a copy of the report on each party.~~

98 ~~—— (2) **In Non-Jury Actions.** In an action to be tried~~
99 ~~without a jury the court shall accept the master's~~
100 ~~findings of fact unless clearly erroneous. Within 10~~
101 ~~days after being served with notice of the filing of the~~
102 ~~report any party may serve written objections thereto~~
103 ~~upon the other parties. Application to the court for~~
104 ~~action upon the report and upon objections thereto shall~~
105 ~~be by motion and upon notice as prescribed in Rule 6(d).~~
106 ~~The court after hearing may adopt the report or may~~
107 ~~modify it or may reject it in whole or in part or may~~
108 ~~receive further evidence or may recommit it with~~
109 ~~instructions.~~
110 ~~—— (3) **In Jury Actions.** In an action to be tried to a jury~~
111 ~~the master shall not be directed to report the evidence.~~
112 ~~The master's findings upon the issues submitted to the~~
113 ~~master are admissible as evidence of the matters found~~

114 and may be read to the jury, subject to the ruling of the
115 court upon any objections in point of law which may be
116 made to the report.

117 — ~~(4) **Stipulation as to Findings.** The effect of a~~
118 ~~master's findings is the same whether or not the parties~~
119 ~~have consented to the reference; but, when the parties~~
120 ~~stipulate that a master's findings of fact shall be final,~~
121 ~~only questions of law arising upon the report shall~~
122 ~~thereafter be considered.~~

123 — ~~(5) **Draft Report.** Before filing the master's report a~~
124 ~~master may submit a draft thereof to counsel for all~~
125 ~~parties for the purpose of receiving their suggestions.~~

126 ~~(f) **Application to Magistrate Judges.** A magistrate judge~~
127 ~~is subject to this rule only when the order referring a matter~~
128 ~~to the magistrate judge expressly provides that the reference~~
129 ~~is made under this rule.~~

130 **Rule 53. Masters**

131 **(a) Appointment.**

132 **(1) Unless a statute provides otherwise, a court may**
133 **appoint a master only to:**

134 **(A) perform duties consented to by the parties;**

135 **(B) hold trial proceedings and make or**
136 **recommend findings of fact on issues to be decided**
137 **by the court if appointment is warranted by:**

138 **(i) some exceptional condition, or**

139 **(ii) the need to perform an accounting or**
140 **resolve a difficult computation of damages;**

141 **or**

142 **(C) address matters that cannot be addressed**
143 **effectively and timely by an available district judge**
144 **or magistrate judge of the district.**

145 (2) A master must not have a relationship to the parties,
146 counsel, action, or court that would require
147 disqualification of a judge under 28 U.S.C. § 455 unless
148 the parties consent with the court's approval to
149 appointment of a particular person after disclosure of a
150 potential ground for disqualification.

151 (3) A master must not, during the period of the
152 appointment, appear as an attorney before the judge who
153 made the appointment.

154 (4) In appointing a master, the court must consider the
155 fairness of imposing the likely expenses on the parties
156 and must protect against unreasonable expense or delay.

157 **(b) Order Appointing Master.**

158 (1) **Hearing.** The court must give the parties notice and
159 an opportunity to be heard before appointing a master.
160 A party may suggest candidates for appointment.

161 **(2) Contents.** The order appointing a master must
162 direct the master to proceed with all reasonable
163 diligence and must state:
164 (A) the master's duties and any limits on the
165 master's authority under Rule 53(c);
166 (B) the circumstances, if any, in which the master
167 may communicate ex parte with the court or a
168 party;
169 (C) the nature of the materials to be preserved as
170 the record of the master's activities;
171 (D) the time limits, procedures, and standards for
172 reviewing the master's orders and
173 recommendations; and
174 (E) the basis, terms, and procedure for fixing the
175 master's compensation under Rule 53(h).

176 **(3) Amendment.** The order appointing a master may
177 be amended at any time after notice to the parties.

178 **(4) Effective Date.** A master's appointment takes
179 effect:

180 **(A)** after the master has filed an affidavit
181 disclosing whether there is any ground for
182 disqualification under 28 U.S.C. § 455 and, if a
183 ground for disqualification is disclosed, after the
184 parties have consented with the court's approval to
185 waive the disqualification, and

186 **(B)** on the date set by the order.

187 **(c) Master's Authority.** Unless the appointing order
188 expressly directs otherwise, a master has authority to regulate
189 all proceedings and to take all appropriate measures to
190 perform fairly and efficiently the assigned duties. The master
191 may impose upon a party any noncontempt sanction provided

192 by Rule 37 or 45, and may recommend to the court a
193 contempt sanction against a party and sanctions against a
194 nonparty.

195 **(d) Evidentiary Hearings.** Unless the appointing order
196 expressly directs otherwise, a master conducting an
197 evidentiary hearing may exercise the power of the appointing
198 court to compel, take, and record evidence.

199 **(e) Master's Orders.** A master who makes an order must
200 file the order and promptly serve a copy on each party. The
201 clerk must enter the order on the docket.

202 **(f) Master's Reports.** A master must report to the court as
203 required by the order of appointment. The master must file
204 the report and promptly serve a copy of the report on each
205 party unless the court directs otherwise.

206 **(g) Action on Master's Order, Report, or**
207 **Recommendations.**

208 **(1) Action.** In acting on a master's order, report, or
209 recommendations, the court may afford an opportunity
210 to be heard and may receive evidence, and may: adopt
211 or affirm; modify; wholly or partly reject or reverse; or
212 resubmit to the master with instructions.

213 **(2) Time.** A party may file objections to — or a motion
214 to adopt or modify — the master's order, report, or
215 recommendations no later than 20 days from the time
216 the master's order, report, or recommendations are
217 served, unless the court sets a different time.

218 **(3) Fact Findings or Recommendations.**

219 {Version 1} The court must decide de novo all fact
220 issues on which a master has made or recommended
221 findings unless: (A) the order of appointment provides
222 that the master's findings will be reviewed for clear

223 error, or (B) the parties stipulate with the court's consent
224 that the master's findings will be final.
225 {Version 2} When a master has made or recommended
226 findings of fact:
227 (A) the court must decide de novo all substantive
228 fact issues unless:
229 (i) the order of appointment provides that the
230 master's findings will be reviewed for clear
231 error, or
232 (ii) the parties stipulate with the court's
233 consent that the master's findings will be
234 final; and
235 (B) the court may set aside non-substantive fact
236 findings or recommended findings only for clear
237 error, unless:

238 (i) the order of appointment provides for de
239 novo decision by the court;
240 (ii) the court receives evidence and decides
241 the facts de novo; or
242 (iii) the parties stipulate with the court's
243 consent that the master's findings will be
244 final.

245 **(4) Legal questions.** In acting under Rule 53(g)(1), the
246 court must decide questions of law de novo, unless the
247 parties stipulate with the court's consent that the
248 master's disposition will be final.

249 **[(5) Discretion.** Unless the order of appointment
250 establishes a different standard of review, the court may
251 set aside a master's ruling on a procedural matter only
252 for an abuse of discretion.]

253 **(h) Compensation.**

254 **(1) Fixing Compensation.** The court must fix the
255 master's compensation before or after judgment on the
256 basis and terms stated in the order of appointment, but
257 the court may set a new basis and terms after notice and
258 opportunity to be heard.

259 **(2) Payment.** The compensation fixed under Rule
260 53(h)(1) must be paid either:

261 **(A)** by a party or parties; or

262 **(B)** from a fund or subject matter of the action
263 within the court's control.

264 **(3) Allocation.** The court must allocate payment of the
265 master's compensation among the parties after
266 considering the nature and amount of the controversy,
267 the means of the parties, and the extent to which any
268 party is more responsible than other parties for the

269 reference to a master. An interim allocation may be
270 amended to reflect a decision on the merits.

271 **(i) Appointment of Magistrate Judge.** A magistrate judge
272 is subject to this rule only when the order referring a matter
273 to the magistrate judge expressly provides that the reference
274 is made under this rule. Unless authorized by a statute other
275 than 28 U.S.C. § 636(b)(2), a court may appoint a magistrate
276 judge as master only for duties that cannot be performed in
277 the capacity of magistrate judge and only in exceptional
278 circumstances. A magistrate judge is not eligible for
279 compensation ordered under Rule 53(h).

COMMITTEE NOTE

Rule 53 is revised extensively to reflect changing practices in using masters. From the beginning in 1938, Rule 53 focused primarily on special masters who perform trial functions. Since then, however, courts have gained experience with masters appointed to perform pretrial and post-trial functions. A study by the Federal Judicial Center documents the variety of responsibilities that have come to be assigned to masters. See Willging, Hooper, Leary,

Miletich, Reagan, & Shapard, *Special Masters' Incidence and Activity* (FJC 2000). This revised Rule 53 recognizes that in appropriate circumstances masters may properly be appointed to perform these functions and regulates such appointments. Rule 53 continues to address trial masters as well, but permits appointment of a trial master in an action to be tried to a jury only if directed by statute or if the parties consent. The new rule clarifies the provisions that govern the appointment and function of masters for all purposes. The core of the original Rule 53 remains. Rule 53 was adapted from equity practice, and reflected a long history of discontent with the expense and delay frequently encountered in references to masters. Public judicial officers, moreover, enjoy presumptions of ability, experience, and neutrality that cannot attach to masters. These concerns remain important today.

The new provisions reflect the need for care in defining a master's role. It may prove wise to appoint a single person to perform multiple master roles. Yet separate thought should be given to each role. Pretrial and post-trial masters are likely to be appointed more often than trial masters. The question whether to appoint a trial master is not likely to be ripe when a pretrial master is appointed. If appointment of a trial master seems appropriate after completion of pretrial proceedings, however, the pretrial master's experience with the case may be strong reason to appoint the pretrial master as trial master. Nonetheless, the advantages of experience may be more than offset by the nature of the pretrial master's role. A settlement master is particularly likely to have played roles that are incompatible with the neutral role of trial master, and indeed may be effective as settlement master only with clear assurance that the appointment will not be expanded to trial-master duties. For similar reasons, it may be wise to appoint separate pretrial masters in cases that warrant reliance

on a master both for facilitating settlement and for supervising pretrial proceedings. There may be fewer difficulties in appointing a pretrial master or trial master as post-trial master, particularly for tasks that involve facilitating party cooperation.

Subdivision (a)(1)

District judges bear initial and primary responsibility for the work of their courts. A master should be appointed only in restricted circumstances or as authorized by statute. Subdivision (a)(1) describes three different standards, relating to appointments by consent of the parties, appointments for trial duties, and appointments for pretrial or post-trial duties.

Consent Masters. Subparagraph (a)(1)(A) authorizes appointment of a master with the parties' consent. Courts should be careful to avoid any appearance of influence that may lead a party to consent to an appointment that otherwise would be resisted. Freely given consent, however, establishes a strong foundation for appointing a master. But party consent does not require that the court make the appointment; the court retains unfettered discretion to refuse appointment. The court may well prefer to discharge all judicial duties through official judicial officers.

Trial Masters. Use of masters for the core functions of trial has been progressively limited. These limits are reflected in the provisions of subparagraph (a)(1)(B) that restrict appointments to exercise trial functions. The Supreme Court gave clear direction to this trend in *La Buy v. Howes Leather Co.*, 352 U.S. 249 (1957); earlier roots are sketched in *Los Angeles Brush Mfg. Corp. v. James*, 272 U.S. 701 (1927). As to nonjury trials, this trend has developed

through elaboration of the "exceptional condition" requirement in present Rule 53(b). This phrase is retained, and will continue to have the same force as it has developed. Although the provision that a reference "shall be the exception and not the rule" is deleted, its meaning is embraced for this setting by the exceptional condition requirement.

Subparagraph (a)(1)(B)(ii) carries forward the approach of present Rule 53(b), which exempts from the "exceptional circumstance" requirement "matters of account and of difficult computation of damages." This approach is justified only as to essentially ministerial determinations that require mastery of much detailed information but that do not require extensive determinations of credibility. Evaluations of witness credibility should only be assigned to a trial master when justified by an exceptional condition.

The use of a trial master without party consent is abolished as to matters to be decided by a jury unless a statute provides for this practice. Present Rule 53(b) authorizes appointment of a master in a jury case. Present Rule 53(e)(3) directs that the master cannot report the evidence, and that "the master's findings upon the issues submitted to the master are admissible as evidence of the matters found and may be read to the jury." This practice intrudes on the jury's province with too little offsetting benefit. If the master's findings are to be of any use, the master must conduct a preliminary trial that reflects as nearly as possible the trial that will be conducted before the jury. This procedure imposes a severe dilemma on parties who believe that the truth-seeking advantages of the first full trial cannot be duplicated at a second trial. It also imposes the burden of two trials to reach even the first verdict. The usefulness of the master's findings as evidence is also open to doubt. It would be folly

to ask the jury to consider both the evidence heard before the master and the evidence presented at trial, as reflected in the longstanding rule that the master "shall not be directed to report the evidence." If the jury does not know what evidence the master heard, however, nor the ways in which the master evaluated that evidence, it is impossible to appraise the master's findings in relation to the evidence heard by the jury.

Abolition of the direct power to appoint a trial master in a jury case leaves the way free to appoint a trial master with the consent of all parties. As in other settings, party consent does not require the court to appoint a master. A trial master should be appointed in a jury case, with consent of the parties and concurrence of the court, only if the parties waive jury trial with respect to the issues submitted to the master or if the master's findings are to be submitted to the jury as evidence in the manner provided by former Rule 53(e)(3). In no circumstance may a master be appointed to preside at a jury trial.

The central function of a trial master is to preside over an evidentiary hearing. This function distinguishes the trial master from most functions of pretrial and post-trial masters. If any master is to be used for such matters as a preliminary injunction hearing or a determination of complex damages issues, for example, the master should be a trial master. The line, however, is not distinct. A pretrial master might well conduct an evidentiary hearing on a discovery dispute, and a post-trial master may often need to conduct evidentiary hearings on questions of compliance.

Rule 53 has long provided authority to report the evidence without recommendations in nonjury trials. This authority is omitted from Rule 53(a)(1)(B). The person who takes the evidence should

work through the determinations of credibility, regardless of the standard of review set by the court. In special circumstances a master may be appointed under Rule 53(a)(1)(C) to take evidence and report without recommendations. Such circumstances might involve, for example, a need to take evidence at a location outside the district — a circumstance that might justify appointment of the trial judge as a master — or a need to take evidence at a time or place that the trial judge cannot attend. Improving communications technology may reduce the need for such appointments and facilitate a "report" by combined visual and audio means.

For nonjury cases, a master also may be appointed to assist the court in discharging trial duties other than conducting an evidentiary hearing. Courts occasionally have appointed judicial adjuncts to perform a variety of tasks that do not fall neatly into any traditional category. A court-appointed expert witness, for example, may be asked to give advice to the court in addition to testifying at a hearing. Or an appointment may direct that the adjunct compile information solely for the purpose of giving advice to the court. If such assignments are given to a person designated as master, the order of appointment should be framed with particular care to define the powers and authority that shape these relatively unfamiliar trial tasks. Even greater care should be observed in making an appointment outside Rule 53.

Pretrial and Post-Trial Masters. Subparagraph (a)(1)(C) authorizes appointment of a master to perform pretrial or post-trial duties. Appointment is limited to matters that cannot be addressed effectively and in a timely fashion by an available district judge or magistrate judge of the district.

Magistrate Judges. Particular attention should be paid to the prospect that a magistrate judge may be available to respond to high-need cases. United States magistrate judges are authorized by statute to perform many pretrial functions in civil actions. 28 U.S.C. § 636(b)(1). Ordinarily a district judge who delegates these functions should refer them to a magistrate judge acting as magistrate judge. A magistrate judge is an experienced judicial officer who has no need to set aside nonjudicial responsibilities for master duties; the fear of delay that often deters appointment of a master is much reduced. There is no need to impose on the parties the burden of paying master fees when a magistrate judge is available. A magistrate judge, moreover, is less likely to be involved in matters that raise disqualification issues.

The statute specifically authorizes appointment of a magistrate judge as special master. 28 U.S.C. § 636(b)(2). In special circumstances, or when expressly authorized by a statute other than § 636(b)(2), it may be appropriate to appoint a magistrate judge as a master when needed to perform functions outside those listed in § 636(b)(1). These advantages are most likely to be realized with trial or post-trial functions. The advantages of relying on a magistrate judge are diminished, however, by the risk of confusion between the ordinary magistrate judge role and master duties, particularly with respect to pretrial functions commonly performed by magistrate judges as magistrate judges. Party consent is required for trial before a magistrate judge, moreover, and this requirement should not be undercut by resort to Rule 53 unless specifically authorized by statute; see 42 U.S.C. § 2000e-5(f)(5). Subdivision (i) requires that appointment of a magistrate judge as master be justified by exceptional circumstances.

A court confronted with an action that calls for judicial attention beyond the court's own resources may request assignment of a district judge or magistrate judge from another district. This opportunity, however, does not limit the authority to appoint a special master; the search for a judge need not be pursued by seeking an assignment from outside the district.

Despite the advantages of relying on district judges and magistrate judges to discharge judicial duties, the occasion may arise for appointment of a nonjudicial officer as pretrial master. Absent party consent, the most common justifications will be the need for time or expert skills that cannot be supplied by an available magistrate judge. An illustration of the need for time is provided by discovery tasks that require review of numerous documents, or perhaps supervision of depositions at distant places. Post-trial accounting chores are another familiar example of time-consuming work that requires little judicial experience. Expert experience with the subject-matter of specialized litigation may be important in cases in which a district judge or magistrate judge could devote the required time. At times the need for special knowledge or experience may be best served by appointment of an expert who is not a lawyer. In large-scale cases, it may be appropriate to appoint a team of masters who possess both legal and other skills.

Pretrial Masters. The appointment of masters to participate in pretrial proceedings has developed extensively over the last two decades as some district courts have felt the need for additional help in managing complex litigation. Reflections of the practice are found in such cases as *Burlington No. R.R. v. Dept. of Revenue*, 934 F.2d 1064 (9th Cir. 1991), and *In re Armco*, 770 F.2d 103 (8th Cir. 1985). This practice is not well regulated by present Rule 53, which focuses

on masters as trial participants. A careful study has made a convincing case that the use of masters to supervise discovery was considered and explicitly rejected in framing Rule 53. See *Brazil, Referring Discovery Tasks to Special Masters: Is Rule 53 a Source of Authority and Restrictions?*, 1983 ABF Research Journal 143. Rule 53 is amended to confirm the authority to appoint — and to regulate the use of — pretrial masters.

Pretrial masters should be appointed only when needed. The parties should not be lightly subjected to the potential delay and expense of delegating pretrial functions to a pretrial master. Ordinarily public judicial officers should discharge public judicial functions. Direct judicial performance of judicial functions may be particularly important in cases that involve important public issues or many parties. Appointment of a master risks dilution of judicial control, loss of familiarity with important developments in a case, and duplication of effort. At the extreme, a broad delegation of pretrial responsibility can run afoul of Article III. See *Stauble v. Warrob, Inc.*, 977 F.2d 690 (1st Cir. 1992); *In re Bituminous Coal Operators' Assn.*, 949 F.2d 1165 (D.C.Cir. 1991); *Burlington No. R.R. v. Dept. of Revenue*, 934 F.2d 1064 (9th Cir. 1991). The risk of increased delay and expense is offset, however, by the possibility that a master can bring to pretrial tasks time, talent, and flexible procedures that cannot be provided by judicial officers. Appointment of a master is justified when a master is likely to substantially advance the Rule 1 goals of achieving the just, speedy, and economical determination of litigation.

Despite the need for caution, the demands of complex litigation may present needs that can be addressed only with appointment of a special master. Some cases may require more attention than a judge

can devote while attending to the needs of other cases, and the most demanding cases may require more than the full time of a single judicial officer. Other cases may call for expert knowledge in a particular subject. The entrenched and legitimate concern that appointment of a special master may engender delay and added expense must be balanced against recognition that an appropriate appointment can reduce cost and delay. Recognition of the essential help that a master can provide is reflected in the wide variety of responsibilities that have been assigned to pretrial masters. Settlement masters are used to mediate or otherwise facilitate settlement. Masters are used to supervise discovery, particularly when the parties have been unable to manage discovery as they should or when it is necessary to deal with claims that thousands of documents are protected by privilege, work-product, or protective order. In special circumstances, a master may be asked to conduct preliminary pretrial conferences; a pretrial conference directed to shaping the trial should be conducted by the officer who will preside at the trial. Masters may be used to hear and either decide or make recommendations on pretrial motions. More general pretrial management duties may be assigned as well. With the cooperation of the courts involved, a special master even may prove useful in coordinating the progress of parallel litigation.

A master also may be appointed to address matters that blur the divide between pretrial and trial functions. The court's responsibility to interpret patent claims as a matter of law, for example, may be greatly assisted by appointing a master who has expert knowledge of the field in which the patent operates. Determination of foreign law may present comparable difficulties. The decision whether to appoint a master to address such matters is governed by subdivision (a)(1)(C), not the trial-master provisions of subdivision (a)(1)(B).

The power to appoint a special master to perform pretrial functions does not preempt the field of alternate dispute resolution under "court-annexed" procedures. A mediator or arbitrator, for example, may be appointed under local alternate-dispute resolution procedures without reliance on Rule 53.

Post-Trial Masters. Courts have come to rely extensively on masters to assist in framing and enforcing complex decrees, particularly in institutional reform litigation. Present Rule 53 does not directly address this practice. Amended Rule 53 authorizes appointment of post-trial masters for these and similar purposes. The constraint of subdivision (a)(1)(C) limits this practice to cases in which the master's duties cannot be performed effectively and in a timely fashion by an available district judge or magistrate judge of the district.

It is difficult to translate developing post-trial master practice into terms that resemble the "exceptional condition" requirement of original Rule 53(b) for trial masters in nonjury cases. The tasks of framing and enforcing an injunction may be less important than the liability decision as a matter of abstract principle, but may be even more important in practical terms. The detailed decree and its operation, indeed, often provide the most meaningful definition of the rights recognized and enforced. Great reliance, moreover, is often placed on the discretion of the trial judge in these matters, underscoring the importance of direct judicial involvement. Experience with mid- and late twentieth century institutional reform litigation, however, has convinced many trial judges and appellate courts that masters often are indispensable. The rule does not attempt to capture these competing considerations in a formula. Reliance on a master is inappropriate when responding to such routine matters as

contempt of a simple decree; see *Apex Fountain Sales, Inc. v. Kleinfeld*, 818 F.2d 1089, 1096-1097 (3d Cir. 1987). Reliance on a master is appropriate when a complex decree requires complex policing, particularly when a party has proved resistant or intransigent. This practice has been recognized by the Supreme Court, see *Local 28, Sheet Metal Workers' Internat. Assn. v. EEOC*, 478 U.S. 421, 481-482 (1986). Among the many appellate decisions are *In re Pearson*, 990 F.2d 653 (1st Cir. 1993); *Williams v. Lane*, 851 F.2d 867 (7th Cir. 1988); *NORML v. Mulle*, 828 F.2d 536 (9th Cir. 1987); *In re Armco, Inc.*, 770 F.2d 103 (8th Cir. 1985); *Halderman v. Pennhurst State School & Hosp.*, 612 F.2d 84, 111-112 (3d Cir. 1979); *Reed v. Cleveland Bd. of Educ.*, 607 F.2d 737 (6th Cir. 1979); *Gary W. v. Louisiana*, 601 F.2d 240, 244-245 (5th Cir. 1979). The master's role in enforcement may extend to investigation in ways that are quite unlike the traditional role of judicial officers in an adversary system. The master in the *Pearson* case, for example, was appointed by the court on its own motion to gather information about the operation and efficacy of a consent decree that had been in effect for nearly twenty years. A classic example of the need for — and limits on — sweeping investigative powers is provided in *Ruiz v. Estelle*, 679 F.2d 1115, 1159-1163, 1170-1171 (5th Cir. 1982), cert. denied, 460 U.S. 1042 (1983).

Other duties that may be assigned to a post-trial master may include such tasks as a ministerial accounting under Rule 53(a)(1)(B) or administration of an award to multiple claimants. Still other duties will be identified as well, and the range of appropriate duties may be extended with the parties' consent.

It may prove desirable to appoint as post-trial master a person who has served in the same case as a pretrial or trial master. Intimate

familiarity with the case may enable the master to act much more quickly and more surely. The skills required by post-trial tasks, however, may be significantly different from the skills required for earlier tasks. This difference may outweigh the advantages of familiarity. In particularly complex litigation, the range of required skills may be so great that it is better to appoint two or even more persons. The sheer volume of work also may favor the appointment of more than one person. The additional persons may be appointed as co-equal masters, as associate masters, or in some lesser role — one common label is "monitor."

Expert Witness Overlap. This rule does not address the difficulties that arise when a single person is appointed to perform overlapping roles as master and as court-appointed expert witness under Evidence Rule 706. To be effective, a court-appointed expert witness may need court-enforced powers of inquiry that resemble the powers of a pretrial or post-trial master. Beyond some uncertain level of power, there must be a separate appointment as a master. Even with a separate appointment, the combination of roles can easily confuse and vitiate both functions. An expert witness must testify and be cross-examined in court. A master, functioning as master, is not subject to examination and cross-examination. Undue weight may be given the advice of a master who provides the equivalent of testimony outside the open judicial testing of examination and cross-examination. A master who testifies and is cross-examined as witness moves far outside the role of ordinary judicial officer. Present experience is insufficient to justify more than cautious experimentation with combined functions. Whatever combination of functions is involved, the Rule 53(a)(1)(B) limit that confines trial masters to issues to be decided by the court does not apply to a person who also is appointed as an expert witness under Evidence Rule 706.

Subdivision (a)(2), (3), and (4).

Masters are subject to the Code of Conduct for United States Judges, with exceptions spelled out in the Code. Special care must be taken to ensure that there is no actual or apparent conflict of interest involving a master. The standard of disqualification is established by 28 U.S.C. § 455. The affidavit required by Rule 53(b)(4)(A) provides an important source of information about possible grounds for disqualification, but careful inquiry should be made at the time of making the initial appointment. The disqualification standards established by § 455 are strict. Because a master is not a public judicial officer, it may be appropriate to permit the parties to consent to appointment of a particular person as master in circumstances that would require disqualification of a judge. The judge must be careful to ensure that no party feels any pressure to consent, but with such assurances — and with the judge's own determination that there is no troubling conflict of interests or disquieting appearance of impropriety — consent may justify an otherwise barred appointment.

The rule prohibits a lawyer-master from appearing before the appointing judge as a lawyer during the period of the appointment. The rule does not address the question whether other members of the same firm are barred from appearing before the appointing judge. Other conflicts are not enumerated, but also must be avoided. For example, a lawyer-master may be involved in other litigation that involves parties, interests, or lawyers or firms engaged in the present action. A lawyer or nonlawyer may be committed to intellectual, social, or political positions that are affected by the case.

Subdivision (b)

The order appointing a pretrial master is vitally important in informing the master and the parties about the nature and extent of the master's duties and authority. Care must be taken to make the order as precise as possible. The parties must be given notice and opportunity to be heard on the question whether a master should be appointed and on the terms of the appointment. To the extent possible, the notice should describe the master's proposed duties, time to complete the duties, standards of review, and compensation. Often it will be useful to engage the parties in the process of identifying the master, inviting nominations, and reviewing potential candidates. Party involvement may be particularly useful if a pretrial master is expected to promote settlement.

Present Rule 53 reflects historic concerns that appointment of a master may lengthen, not reduce, the time required to reach judgment. Rule 53(d)(1) directs the master to proceed with all reasonable diligence, and recognizes the right of a party to move for an order directing the master to speed the proceedings and make the report. Today, a master should be appointed only when the appointment is calculated to speed ultimate disposition of the action. New Rule 53(b)(2) reminds court and parties of the historic concerns by requiring that the appointing order direct the master to proceed with all reasonable diligence.

Rule 53(b)(2) also requires precise designation of the master's duties and authority. There should be no doubt among the master and parties as to the tasks to be performed and the allocation of powers between master and court to ensure performance. Clear delineation of topics for any reports or recommendations is an important part of this process. It also is important to protect against delay by establishing a time schedule for performing the assigned duties.

Early designation of the procedure for fixing the master's compensation also may provide useful guidance to the parties. And experience may show the value of describing specific ancillary powers that have proved useful in carrying out more generally described duties.

Ex parte communications between a master and the court present troubling questions. Often the order should prohibit such communications, assuring that the parties know where authority is lodged at each step of the proceedings. Prohibiting ex parte communications between master and court also can enhance the role of a settlement master by assuring the parties that settlement can be fostered by confidential revelations that will not be shared with the court. Yet there may be circumstances in which the master's role is enhanced by the opportunity for ex parte communications. A master assigned to help coordinate multiple proceedings, for example, may benefit from off-the-record exchanges with the court about logistical matters. The rule does not directly regulate these matters. It requires only that the court address the topic in the order of appointment.

Similarly difficult questions surround ex parte communications between a master and the parties. Ex parte communications may be essential in seeking to advance settlement. Ex parte communications also may prove useful in other settings, as with in camera review of documents to resolve privilege questions. In most settings, however, ex parte communications with the parties should be discouraged or prohibited. The rule does not provide direct guidance, but does require that the court address the topic in the order of appointment.

Subdivision (b)(2)(C) provides that the appointment order must state the nature of the materials to be preserved as the record of the

master's activities. It is not feasible to prescribe the nature of the record without regard to the nature of the master's duties. The records appropriate to discovery duties may be different from those appropriate to encouraging settlement, investigating possible violations of a complex decree, or making recommendations for trial findings. In some circumstances it may be appropriate for a party to file materials directly with the court as provided by Rule 5(e), but in many circumstances filing with the court may be inappropriate. Confidentiality is vitally important with respect to many materials that may properly be considered by a master. Materials in the record can be transmitted to the court, and filed, in connection with review of a master's order, report, or recommendations under subdivision (f) and (g). Independently of review proceedings, the court may direct filing of any materials that it wishes to make part of the public record.

In setting the procedure for fixing the master's compensation, it is useful at the outset to establish specific guidelines to control total expense. The order of appointment should state the basis, terms, and procedures for fixing compensation. When there is an apparent danger that the expense may prove unjustifiably burdensome to a party or disproportionate to the needs of the case, it also may help to provide for an expected total budget and for regular reports on cumulative expenses. The court has power under subdivision (h) to change the basis and terms for determining compensation, but should recognize the risk of unfair surprise to the parties.

The provision in Rule 53(b)(3) for amending the order of appointment is as important as the provisions for the initial order. New opportunities for useful assignments may emerge as the pretrial process unfolds, or even in later stages of the litigation. Conversely, experience may show that an initial assignment was too broad or

ambitious, and should be limited or revoked. It even may happen that the first master is ill-suited to the case and should be replaced. Anything that could be done in the initial order can be done by amendment.

Subdivision (b)(4) describes the effective date of a master's appointment. The appointment cannot take effect until the master has filed an affidavit disclosing whether there is any ground for disqualification under 28 U.S.C. § 455. If the affidavit discloses a ground for disqualification, the appointment can take effect only if the parties, knowing of the ground for disqualification, consent with the court's approval to waive the disqualification. The appointment order must also provide an effective date, which should be set to follow the filing of the (b)(4)(A) affidavit.

Subdivision (c)

Subdivision (c) is a simplification of the provisions scattered throughout present Rule 53. It is intended to provide the broad and flexible authority necessary to discharge the master's responsibilities. The most important delineation of a master's authority and duties is provided by the Rule 53(b) appointing order. It is made clear that the contempt power referred to in present Rule 53(d)(2) is reserved to the judge, not the master.

Subdivision (d)

The subdivision (d) provisions for evidentiary hearings are reduced from the extensive provisions in current Rule 53. This simplification of the rule is not intended to diminish the authority that

may be delegated to a master. Reliance is placed on the broad and general terms of subdivision (c).

Subdivision (e)

Subdivision (e) provides that a master's order must be filed and entered on the docket. It must be promptly served on the parties, a task ordinarily accomplished by mailing or other means as permitted by Rule 5(b). In some circumstances it may be appropriate to have the clerk's office assist the master in mailing the order to the parties.

Subdivision (f)

Subdivision (f) restates some of the provisions of present Rule 53(e)(1). The report is the master's primary means of communication with the court. The materials to be provided to support review of the report will depend on the nature of the report. The master should provide all portions of the record preserved under Rule 53(b)(2)(C) that the master deems relevant to the report. The parties may designate additional materials from the record, and may seek permission to supplement the record with evidence. The court may direct that additional materials from the record be provided and filed. Given the wide array of tasks that may be assigned to a pretrial master, there may be circumstances that justify sealing a report or review record against public access — a report on continuing or failed settlement efforts is the most likely example. A post-trial master may be assigned duties in formulating a decree that deserve similar protection. Such circumstances may even justify denying access to the report or review materials by the parties, although this step should be taken only for the most compelling reasons. Sealing is much less likely to be appropriate with respect to a trial master's report.

Before formally making an order, report, or recommendations, a master may find it helpful to circulate a draft to the parties for review and comment. The usefulness of this practice depends on the nature of the master's proposed action.

A master may learn of matters outside the scope of the reference. Rule 53 does not address the question whether — or how — such matters may properly be brought to the court's attention. Matters dealing with settlement efforts, for example, often should not be reported to the court. Other matters may deserve different treatment. If a master concludes that something should be brought to the court's attention, ordinarily the parties should be informed of the master's communication.

Subdivision (g)

The provisions of subdivision (g)(1), describing the court's powers to afford a hearing, take evidence, and act on a master's order, report, or recommendations are drawn from present Rule 53(e)(2), but are not limited, as present Rule 53(e)(2) is limited, to the report of a trial master in a nonjury action.

The subdivision (g)(2) time limits for objecting to — or seeking adoption or modification of — a master's order, report, or recommendations, are important. They are not jurisdictional. The subordinate role of a master means that although a court may properly refuse to entertain untimely review proceedings, there must be power to excuse the failure to seek timely review. The basic time period is lengthened to 20 days because the present 10-day period may be too short to permit thorough study and response to a complex report dealing with complex litigation. No time limit is set for action by the

court when no party undertakes to file objections or move for adoption or modification of a master's order, report, or recommendations. The court remains free to adopt the master's action or to disregard it at any relevant point in the proceedings. If the court takes no action, the master's action has no effect outside the terms of the court's own orders and judgment.

{Version 1 Subdivision (g)(3) provides several alternative standards for review of a master's fact findings or recommendations for fact findings, but the court must decide de novo all fact issues unless the order of appointment provides a clear-error standard of review or the parties stipulate with the court's consent that the master's findings will be final. The determination whether to establish a clear-error standard of review ordinarily should be made at the time of the initial order of appointment. Although the order may be amended to establish this standard at any time after notice to the parties under Rule 53(b)(3), such an amendment should be made only with the consent of the parties or for compelling reasons. The parties may rely on the expectation of de novo determination by the court in conducting proceedings before the master. If a clear-error standard of review is set by the order of appointment, application of the standard will be as malleable in this context as it is in Rule 52; in applying the clear-error standard, moreover, the court may take account of the fact that the relationship between a court and a master is not the same as the relationship between an appellate court and a trial court. A court may not accord the master's findings or recommendations greater weight than clear-error review permits without the consent of the parties; clear-error review marks the outer limit of appropriate deference to a master. Parties who wish to expedite proceedings, however, may — with the court's consent — stipulate that the master's findings will be final.}

{Version 2 Subdivision (g)(3) provides standards for review of a master's findings or recommendations for fact findings. The structure is adapted from the system established by 28 U.S.C. § 636(b)(1) for review of the decisions or recommendations of a magistrate judge. Substantive fact issues are to be decided de novo by the court unless the order of appointment establishes a clear-error standard of review or the parties stipulate with the court's consent that the master's findings will be final. Non-substantive fact issues — one example would be determinations with respect to discovery conduct — are to be reviewed only for clear error unless the order of appointment provides for de novo review, the court receives evidence and decides the facts de novo, or the parties stipulate with the court's consent that the master's findings will be final. The determination whether to establish a different standard of review in the order of appointment ordinarily should be made at the time of the initial order. Although the order may be amended to depart from the presumptive standard at any time after notice to the parties under Rule 53(b)(3), such an amendment should be made only with the consent of the parties or for compelling reasons. The parties may rely on the anticipated standard of review in conducting proceedings before the master. When a clear-error standard of review applies, application of the standard will be as malleable in this context as it is in Rule 52; in applying the clear-error standard, moreover, the court may take account of the fact that the relationship between a court and a master is not the same as the relationship between an appellate court and a trial court. A court may not accord the master's findings or recommendations greater weight than clear-error review permits without the consent of the parties; clear-error review marks the outer limit of appropriate deference to a master. Parties who wish to expedite proceedings, however, may — with the court's consent — stipulate that the master's findings will be final.}

Absent consent of the parties, questions of law cannot be delegated for final resolution by a master. As with matters of fact, a party stipulation can make the master's disposition final only if the court consents to the stipulation.

Apart from factual and legal questions, masters often make determinations that, when made by a trial court, would be treated as matters of procedural discretion. The court may set a standard for review of such matters in the order of appointment, and may amend the order to establish the standard. If no standard is set by the original or amended order appointing the master, review of procedural matters is for an abuse of discretion. The abuse-of-discretion standard is as dependent on the specific type of procedural issue involved in this setting as in any other. In addition, the subordinate role of the master means that the trial court's review for abuse of discretion is much more searching than the review that an appellate court makes of a trial court. A trial judge who believes that a master has erred has ample authority to correct the error.

[If subdivision (g)(5) is not adopted, the Committee Note would say: No standard of review is set for rulings on procedural matters. The court may set standards of review in the order appointing the master, see Rule 53(b)(2)(D), or may face the issue only when it arises. If a standard is not set in the order appointing the master, a party seeking review may ask the court to state the standard of review before framing the arguments on review.]

Subdivision (h)

The need to pay compensation is a substantial reason for care in appointing private persons as masters. The burden on the parties can be reduced to some extent by recognizing the public service element of the master's office. One court has endorsed the suggestion that an attorney-master should be compensated at a rate of about half that earned by private attorneys in commercial matters. See *Reed v. Cleveland Bd. of Educ.*, 607 F.2d 737, 746 (6th Cir. 1979). But even a discounted public-service rate can impose substantial burdens.

Payment of the master's fees must be allocated among the parties and any property or subject-matter within the court's control. Many factors, too numerous to enumerate, may affect the allocation. The amount in controversy may provide some guidance in making the allocation, although it is likely to be more important in the initial decision whether to appoint a master and whether to set an expense limit at the outset. The means of the parties also may be considered, and may be particularly important if there is a marked imbalance of resources. Although there is a risk that a master may feel somehow beholden to a well-endowed party who pays a major portion of the fees, there are even greater risks of unfairness and strategic manipulation if costs can be run up against a party who can ill afford to pay. The nature of the dispute also may be important — parties pursuing matters of public interest, for example, may deserve special protection. A party whose unreasonable behavior has occasioned the need to appoint a master, on the other hand, may properly be charged all or a major portion of the master's fees. It may be proper to revise an interim allocation after decision on the merits. The revision need not await a decision that is final for purposes of appeal, but may be made to reflect disposition of a substantial portion of the case.

The basis and terms for fixing compensation should be stated in the order of appointment. The court retains power to alter the initial basis and terms, after notice and an opportunity to be heard, but should protect the parties against unfair surprise.

Subdivision (i)

This subdivision carries forward present Rule 53(f). It is changed, however, to emphasize that a magistrate judge should be appointed as a master only when justified by exceptional circumstances. Ordinarily a magistrate judge should not be appointed as a master to discharge duties that could be discharged in the capacity of magistrate judge. 28 U.S.C. § 636(b)(2) provides for designation of a magistrate judge to serve as a special master pursuant to the Federal Rules of Civil Procedure. This provision was adopted before later statutes that expanded the duties that a magistrate judge may perform as magistrate judge. Subdivision (i) recognizes this expansion, and implements the statutory purpose to have magistrate judges function as magistrate judges whenever authorized by § 636. Specific provisions in other statutes that authorize the appointment of a magistrate judge as special master, however, may be implemented according to their terms; an example is provided by 42 U.S.C. § 2000e-5(f)(5). See the discussion in subdivision (a). Because the magistrate judge remains a judicial officer, the parties cannot consent to waive disqualification under 28 U.S.C. § 455 in the way that Rule 53(a)(2) permits with respect to a master who is not a judicial officer.

Rule 54. Judgments; Costs

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Rule 54(d)(2)(D) is revised to reflect amendments to Rule 53.

Rule 71A. Condemnation of Property

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2 **(h) Trial.**

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4 In the event that a commission is appointed the court
5 may direct that not more than two additional persons serve as
6 alternate commissioners to hear the case and replace
7 commissioners who, prior to the time when a decision is filed,
8 are found by the court to be unable or disqualified to perform
9 their duties. An alternate who does not replace a regular
10 commissioner shall be discharged after the commission
11 renders its final decision. Before appointing the members of
12 the commission and alternates the court shall advise the
13 parties of the identity and qualifications of each prospective
14 commissioner and alternate and may permit the parties to

15 examine each such designee. The parties shall not be
16 permitted or required by the court to suggest nominees. Each
17 party shall have the right to object for valid cause to the
18 appointment of any person as a commissioner or alternate. If
19 a commission is appointed it shall have the ~~powers~~ authority
20 of a master provided in ~~subdivision~~ Rule 53 (c) ~~of Rule 53~~
21 and proceedings before it shall be governed by the provisions
22 of ~~paragraphs (1) and (2) of subdivision~~ Rule 53 (d) ~~of Rule~~
23 ~~53~~. Its action and report shall be determined by a majority
24 and its findings and report shall have the effect, and be dealt
25 with by the court in accordance with the practice, prescribed
26 in ~~paragraph (2) of subdivision~~ Rule 53 (e), (f), and (g) ~~of~~
27 ~~Rule 53~~. Trial of all issues shall otherwise be by the court.

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Committee Note

The references to specific subdivisions of Rule 53 are deleted or revised to reflect amendments of Rule 53.